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IN THE

Supreme Court of the United States

October Term, 1982

MARINE MIDLAND BANK,

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR FEDERAL CIRCUIT

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QUESTIONS PRESENTED

1. Has a compensable "taking" occurred when the Government through its title-vesting clause, contained in over 10,000 contracts nationally, takes property subject to a security interest validly perfected under state law?
2. In establishing the relative priority of competing federal and private interests in property, is uniform commercial state law the appropriate federal rule to be applied?
3. Given that state law is the appropriate federal rule to be applied in such cases, under Virginia law is Marine Midland Bank's properly perfected security interest paramount to the Government's claimed interest?

PARTIES TO THE PROCEEDING

The parties to this proceeding are Marine Midland Bank and the United States. After the original institution of these proceedings, Marine Midland Bank converted from a state banking corporation to a national banking association, changing its name to Marine Midland Bank, N.A.[1]

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[1] Petitioner-Plaintiff, Marine Midland Bank, N.A., a national banking association, is a wholly-owned subsidiary of Marine Midland Banks, Inc., a Delaware corporation, which is in turn 51 percent owned by The Hongkong and Shanghai Banking Corporation, a Hong Kong Corporation. Included in Part C of the Appendix are a list of the subsidiaries of Marine Midland Banks, Inc. and a list of the subsidiaries and related interests of The Hongkong and Shanghai Banking Corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES	v
OPINION BELOW	vii
GROUNDS FOR JURISDICTION	vii
CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS	viii
STATEMENT OF THE CASE	1
BASIS FOR FEDERAL JURISDICTION	10
REASONS FOR GRANTING WRIT OF CERTIORARI	10
A. Summary	10
B. Governing Law	12
C. Need for Uniformity and the Objectives of the Federal Program	15
D. The Disruption of Nationwide Commerce	28
E. Application of State Law: Lien and Title Theories	39
CONCLUSION	49
CERTIFICATE OF SERVICE	52
APPENDIX	
Part A	
Opinion Below	1

Order Respecting Rehearing 2.

Part B

Federal Statutes 24

State Statutes 27

Federal Regulations 38

Part C

Subsidiaries of Marine Midland Banks, Inc. 57

Subsidiaries and Related Interests of the Hongkong and Shanghai Banking Corporation 59

TABLE OF AUTHORITIES

Cases	Page
Aetna Cas. & Surety Co. v. United States, 655 F.2d 1047, 1057 (Ct. Cl. 1981)	40
Armstrong v. United States, 364 U.S. 40 (1960	40,46
In re Murdock Mach. & Eng'r. Co., 620 F.2d 767 (10th Cir. 1980)	passim
Marine Midland Bank v. United States, 687 F.2d 395 (Ct. Cl. 1982)	passim
United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979)	passim
United States v. Yazell, 382 U.S. 341 (1966)	26

Statutes	Page
10 U.S.C. § 2307	14,18,20
28 U.S.C. § 1491	5,10
31 U.S.C. § 529	14
Va. Code § 8.1-201(44)	45
Va. Code § 8.2-401(2)	46
Va. Code § 8.2-402	33

Va. Code § 8.2-501	46
Va. Code § 8.2-502	46
Va. Code § 8.9-107	33,34
Va. Code § 8.9-204	45
Va. Code § 8.9-301	passim
Va. Code § 8.9-312	35,38,41
Va. Code § 11-1	47
Va. Code § 55-95	48
Va. Code § 55-96	48

Other Authorities	Page
32 C.F.R. § 163.1	22
32 C.F.R. § 163.2	21
32 C.F.R. § 163.9	14
32 C.F.R. § 163.11	14
32 C.F.R. § 163.24	22
32 C.F.R. § 163.26	22
32 C.F.R. § 163.28	23
32 C.F.R. § 163.79-2	passim
32 C.F.R. § 163.94	25,31
S. Rep. No. 2201, 85th Cong., 2d Sess., reprinted in [1958] U.S. Code Cong. & Ad. News 4021	passim

OPINION BELOW

The opinion of the Court of Claims (App., Part A, infra) is reported at 231 Ct. Cl. ____ (1982), 687 F.2d 395 (Ct. Cl. 1982).[2]

GROUNDS FOR JURISDICTION

The date of judgment sought to be reviewed is August 25, 1982. Marine Midland Bank's Motion for Rehearing was denied on September 24, 1982.[3] (See App., Part A, infra.) The jurisdictional statutory provision is 28 U.S.C. § 1255.

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[2] The slip opinion of the Court of Claims is reproduced in the Appendix, Part A, infra; citation is made to the unofficial report.

[3] The Order of the Court of Claims denying the Motion for Rehearing is reproduced in the Appendix, Part A, infra.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

A. U.S. Const. amend. V: "[n]or shall private property be taken for public use, without just compensation."

B. Statutes[4]: 10 U.S.C. § 2307, 28 U.S.C. § 1491, 31 U.S.C. § 529; Va. Code §§ 8.1-201(44), 8.2-401(2), 8.2-402, 8.2-501, 8.2-502, 8.9-107, 8.9-204, 8.9-301, 8.9-312, 11-1, 55-95, 55-96.

C. Regulations: 32 C.F.R. §§ 163.1, 163.2, 163.9, 163.11, 163.24, 163.26, 163.28, 163.79-2, 163.94.

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[4] The pertinent text of the statutes and regulations cited in this petition are reproduced in the Appendix, Part B, infra.

IN THE

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MARINE MIDLAND BANK,

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PETITION FOR A WRIT OR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR FEDERAL CIRCUIT

STATEMENT OF THE CASE

This case involves a dispute with far-reaching implications nationally between Marine Midland Bank, Buffalo, New York (Marine) and the United States (the Government or the United States) as

to their respective interests in certain property of Bond Trailer Division, Inc. (Bond), consisting of its inventory of materials, supplies, work in progress, and similar property (the Collateral). This action was commenced as a detinue proceeding in the Circuit Court of Rockingham County, Virginia. Marine sought to recover the Collateral pursuant to certain security agreements executed by Bond (the Security Agreements), dated and executed December 20, 1977, to secure its guaranty (the Guaranty) of notes originally aggregating $1,700,000 (the Notes) executed by a related corporation, United Manufacturing Co. (United). United defaulted under its obligations under the Notes and demand was made by Marine upon Bond for payment pursuant to the Guaranty. Upon Bond's failure to satisfy the Guaranty and its refusal to voluntarily

deliver the Collateral to Marine, Marine instituted these proceedings on May 18, 1979 in the Rockingham County Circuit Court to obtain physical possession of the Collateral. On June 15, 1979, the United States filed its motion to intervene in the state court proceedings, claiming title to certain portions of the Collateral under the Government's "Progress Payment Clause for Small Business Concerns," 32 C.F.R. § 163.79-2 (alternatively referred to as the "title-vesting clause"). The case then was removed to the United States District Court for the Western District of Virginia.

Subsequently, Bond filed a petition in bankruptcy in the Bankruptcy Court for the Western District of Virginia. In those proceedings, all the property of Bond not claimed by the Government was sold and the proceeds less certain

expenses were paid to Marine. Determining that there was no equity in the bankrupt's estate, the property claimed by the Government and Marine was abandoned by the Bankruptcy Court.

Prior to the abandonment of the property from the bankruptcy proceeding, the Government and Marine agreed that the value of the Collateral in dispute, located in Rockingham County, Virginia, was $250,000. To achieve the best utilization of these materials, the parties agreed that the Government could take possession of these items subject to payment to Marine of the $250,000, should it ultimately be judicially determined that Marine's security interest was paramount to the asserted interest of the Government.

The proceedings in the United States District Court, held in abeyance pending the outcome of the bankruptcy

proceedings, were reopened upon the abandonment of the Collateral from the Bankruptcy Court. This case came before the Court of Claims under 28 U.S.C. § 1491 upon a transfer from the United States District Court for the Western District of Virginia, pursuant to an order entered by that court on April 27, 1981. Marine then filed an amended petition in the Court of Claims, requesting an award of $250,000 plus interest for the Government's taking of property which was subject to the paramount lien of Marine. Bond has never made an appearance in the proceedings in state court, the district court or the Court of Claims.

The Government's claim to the Collateral arises out of three contracts between Bond and the Government dated June 30, 1976, March 3, 1978, and May 9, 1978 (the Government Contracts). In the

case of the contracts effective June 30, 1976 and March 3, 1978, a title-vesting clause was included in its original bid solicitation. In the contract dated May 9, 1978, the clause was subsequently added to the contract by amendment dated September 19, 1978. Each of these Government Contracts involves the purchase of cargo or munitions trailers built by Bond for use by the Air Force or the Navy. The trailers were to be manufactured according to Government specifications, and Bond was to be paid periodically during the course of the contract on the basis of 85% of costs approved by the Government, with the retainage to be paid on the completion of each contract. These payments were to be made pursuant to the Government's title-vesting clause. In addition to providing for financing to Bond during its manufacture of these trailers, this

clause also contained provisions purporting to transfer title to goods to the Government. The pertinent provisions of this contract clause read as follows:

> (d) Title. Immediately, upon the date of this contract, title to all parts; materials; inventories; work in process . . . theretofore acquired or produced by the Contractor and allocable [allocated][5] or properly chargeable to this contract under sound and generally accepted accounting principles and practices shall forthwith vest in the Government; and title to all like property thereafter acquired or produced by the Contractor and allocated or properly chargeable to this contract as

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[5] There exists some question about whether the term "allocable" or allocated" was used in the applicable regulation. See 32 C.F.R. § 163.79-2 infra. The Court of Claims, however, in its opinion, quoted from the Code of Federal Regulations, which utilized the term "allocated." See Marine Midland Bank v. United States, 687 F.2d 395, 397 (Ct. Cl. 1982).

> aforesaid shall forthwith vest in the Government upon said acquisition, production, or allocation . . . .

32 C.F.R. § 163.79-2 (Defense Contract Financing Regulations)(formerly § 7-104.35, Armed Services Procurement Regulations).

Bond, a Virginia corporation, operated its manufacturing facility at its principal place of business in Rockingham County, Virginia. Its business was not limited to government contracting work and its facilities were open to the public. All of the Collateral sought by Marine in these proceedings was located in Rockingham County, Virginia, at the time of the institution of these proceedings.

Marine filed financing statements evidencing its security interest in the Collateral with the Virginia State Corporation Commission on January 8,

1978, and with the Circuit Court of Rockingham County on January 9, 1978. While Marine knew that Bond manufactured items for the Government, it was not aware that the Government Contracts contained the "title-vesting clause." It is undisputed that neither the Government Contracts nor any financing statements relating to these contracts were ever recorded in Virginia by the Government or Bond.

On cross motions for summary judgment, the Court of Claims granted the Government's motion, holding that the Government's claim under its hidden title-vesting clause took priority over Marine's properly perfected security interests in the Collateral. Rather than adopting uniform state law as the federal priority rule, the Court of Claims fashioned a unique rule which validates secret liens and which will

have enormous, disruptive effect on commerce nationwide. Marine Midland Bank v. United States, 687 F.2d 395, 404 (Ct. Cl. 1982).

BASIS FOR FEDERAL JURISDICTION

The basis for jurisdiction in the Court of Claims was 28 U.S.C. § 1491 which provides:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort . . . .

REASONS FOR GRANTING WRIT OF CERTIORARI

A. Summary

A writ of certiorari should be granted because (1) the Court of Claims has reached a decision inconsistent with

the decision of this Court in Kimbell Foods, Inc. v. United States, 440 U.S. 715 (1979); (2) the Court of Claims and the Tenth Circuit Court of Appeals have reached opposite results as to the applicability of state law in resolving competing Government and private interests in property; (3) the decision of the Court of Claims, which affects more than 10,000 Government contracts in which the title-vesting clause is found[6], will result in recurring problems of national significance in

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[6] This Court previously has granted certiorari in cases from the Court of Claims when, as in this case, important questions of construction of Government contracts were presented. See, e.g., United States v. Utah Constr. & Min. Co., 384 U.S. 394 (1966); United States v. Blair, 321 U.S. 730 (1943).

that it validates secret liens upon collateral and thereby undermines the expectations of creditors who justifiably rely on state law to obtain superior liens and significantly limits the reliability of the Uniform Commercial Code's notice-filing system which plays a fundamental role in commercial dealings; and (4) the decision of the Court of Claims thwarts, rather than effectuates, the program adopted by Congress for the financing of small government contractors.

B. Governing Law

To determine the rights of Marine and the United States in this case, the pivotal inquiries are "whether federal or state law governs the controversies; and second, if federal law applies, whether this Court should fashion a

uniform priority rule or incorporate state commercial law." Kimbell Foods, Inc. v. United States, 440 U.S. 715, 718. The Court of Claims chose to fashion a unique federal rule rather than adopting uniform state law as the federal priority rule. In so doing, it failed to follow the three principles set forth by this Court in Kimbell Foods for determining, in the absence of specific congressional guidance, whether to adopt state law or to fashion a uniform federal rule: (1) the need for uniformity; (2) the likelihood of frustrating specific federal objectives; and (3) the potential for disruption of commercial relationships. 440 U.S. at 728-29.

In Government procurement law, there exists a general proscription against the Government making advance payments, partial payments, progress

payments and other payments to contractors prior to completion of the work. 31 U.S.C. § 529. These types of payments are separate and distinct. "Advance payments" are made to a contractor prior to complete performance and are not measured by performance. 32 C.F.R. § 163.9. "Progress payments," the type of payment involved in this case, are made as the work progresses on a contract, being based on the costs incurred or the percentage of completion at a particular time. 32 C.F.R. § 163.11.

Congress, in 10 U.S.C. § 2307, has made an exception to the general prohibition against payments being made before Government work is completed. This statutory exception provides for federal lien supremacy only in the case of "advance" payments, which are to be made only if the contractor gives

security in a form such as a lien in favor of the United States. If such a lien is given, it then will be superior to any other liens. The statute is silent as to how these liens are to be perfected or notice given to the public of their existence. With respect to "progress" payments, the type of payment involved in this case, it is clear that Congress has not established either liens or their priority. This Court then must fashion the appropriate rules of law to determine the analytical framework for the resolution of the competing interests of the Government, and lenders and suppliers of Government contractors.

C. Need for Uniformity and the Objectives of the Federal Program

To determine whether federal law requires a unique federal rule of

priority, this Court has stated that the particular federal program must be examined to "determine whether application of state law would frustrate specific objectives of the federal programs." Kimbell Foods, Inc. v. United States, 440 U.S. at 728. The federal program in this case involves the procurement of supplies, material and equipment for the national defense and the financing of small businesses; there can be little question that these activities involve important national and federal interests. Yet, this factor does not necessarily require nationwide standards favoring the Government, especially when to do so would dramatically disrupt nationwide commercial relationships predicated on uniform state law. As this Court in Kimbell Foods quoted Judge Friendly with approval:

> When the states have gone so far in achieving the desirable goal of a uniform law governing commercial transactions, it would be a distinct disservice to insist on a different one for the segment of commerce, important but still small in relation to the total, consisting of transactions with the United States.

440 U.S. at 732.

It is fundamental in this case that the goals of the Government's title-vesting clause be reviewed and a determination made of whether the adoption of state law realistically can be expected to impinge on the Government's ability to supply its national defense. Contrary to the arguments made by the Government in the Court of Claims, the adoption of state law would not result in a hindrance to the Government's procurement policy, as the Tenth Circuit recognized in In re Murdock Mach. & Eng'r Co., 620 F.2d 767, 772 (10th Cir. 1980). In Murdock, the Tenth

Circuit adopted the state commercial code, which "controls the mainstream of business life in this country," as the rule of decision and held that a vendor of goods to a government contractor retained the right of stoppage of goods in transit upon learning of the contractor's insolvency. Despite the presence of a title-vesting clause in the contract involved in Murdock, the court held that the vendor was entitled to the proceeds upon the sale of the goods.

The legislation giving rise to the title-vesting clause, 10 U.S.C. § 2307, was not designed primarily to facilitate defense procurement. Rather, as its legislative history clearly indicates, the intended beneficiaries of 10 U.S.C. § 2307 are small businesses. Upon the adoption of 10 U.S.C. § 2307, the Senate concluded:

> The bill would also modernize the existing statutory provisions of law, relating to advance and progress payments, and authorize the limitation of advance and progress payments on any procurement warranting such action to small business concerns. These proposals will improve the ability of small business concerns to compete for Government awards without any increase in cost to the Government. As a result, the Government will achieve the benefits flowing from increased competition and from the establishment of new sources of supply with the attendant economy in procurement costs and improvement in the Nation's security.
>
> [The bill] would permit the making of advance and progress payments to suppliers holding contracts with the Government in such manner as would enable small business concerns to participate in furnishing certain types of supplies and services which heretofore were only obtainable from the large or financially strong concerns.

S. Rep. No. 2201, 85th Cong., 2d Sess., reprinted in [1958] U.S. Code Cong. & Ad. News 4021, 4023 (emphasis added).

The Administrator of the General Services Administration likewise had these comments on this legislation:

> It is believed that the draft bill will help achieve the objectives of the Cabinet Committee on Small Businesses -- to eliminate needless inconsistencies, to simplify, and to remove any inequities, in procurement procedures of Government agencies, with a view to facilitating participation of small businesses in work on Government contracts.

Id. at 4029 (emphasis added). These and other comments filed with respect to this legislation show that the Congress sought to support small businesses. Id., et. seq.

The regulations adopted pursuant to 10 U.S.C. § 2307 do not provide the Defense Department with emergency procurement powers, but rather are designed to facilitate the use of progress payments to aid firms whose

capital or financial condition limits their ability to bid and obtain Government contracts. See 32 C.F.R. § 163.2. Simply stated, the Government, if it chose, could refuse to pay for any of its goods until delivery. This action obviously would restrict the number of businesses which could compete for Government work to those which could finance internally or through conventional financing sources, effectively thwarting the main purpose of the legislation. Clearly, a decision of this Court to apply uniform state law, as did the Tenth Circuit in Murdock, will not restrict the Government's ability to appropriate property in a national emergency. It is undisputed that the Government may take property to accomplish the common defense, however, its authority to do so is subject to the

right of persons under the Fifth Amendment to receive just compensation for such takings.

The Court of Claims correctly found that the progress payments in this case constituted a lending activity by the Government. 687 F.2d at 398-99. The Defense Contract Financing Regulations, 32 C.F.R. § 163.1 et. seq., clearly establish the Defense Department's role as a lender. As vividly demonstrated by its own regulations, the Government's activities in this context are closely akin to those of the Small Business Administration (SBA) and the Farmers Home Administration (FHA), the federal agencies involved in Kimbell Foods, as a financier of small businesses. See 32 C.F.R. § 163.24 (requiring the examination of the contractor's financial capabilities); 32 C.F.R. § 163.26

(requiring procurement offices to be staffed with financial credit analysts); 32 C.F.R. § 163.28 (requiring review of essential financial information, balance sheets, profit and loss statements, compensation agreements, dividends, and cash forecasts). As the Court of Claims noted:

> The goal of the system, as articulated in Subpart B -- 'Basic Policies' is '[t]he providing of funds for payment in expenses of performance of contracts [as] an essential element of defense production.' Section 163.18. Further, 'Prudent contract financing supports procurement and production * * * by providing necessary funds to supplement other funds available to contractors for contract performance.' Id. Recognizing the risks inherent in loaning money, however, the regulations provide that such financing must be designed to minimize monetary loss to the government. Section 163.19. The various types of advance payments are granted only in a set order of preference, all of which succeed private financing on reasonable terms,

> section 163.22, and financing is not allowed at all unless the contractor appears properly creditworthy.

Marine Midland Bank v. United States, 687 F.2d at 398. While the Court of Claims concluded that a uniform federal rule was required, it failed to distinguish between a program which, in encouraging small business participation, establishes uniform credit criteria and the more mechanical aspect of commercial lending such as the verification of collateral and the protection of the loan.

In Kimbell Foods, this Court also dealt with nationwide lending programs designed to accomplish objectives beyond those of merely lending money: the fostering of small business and assistance to farmers. In both instances, similar meticulous credit detail was obtained prior to the issuance of the

loans. 440 U.S. at 732. As with the SBA and FHA, the Defense Department's own regulations belie the assertion that a unique federal rule of priority is required. In addition to the close credit scrutiny provided by the regulations described above, the existing regulations instruct that "care should be taken to assure, to the extent necessary, that the title to the Government will be free of all encumbrances. The procedure will in this respect necessarily vary with the particular circumstances of individual cases." 32 C.F.R. § 163.94. Once again, this Court's holding in Kimbell Foods is instructive:

> Because each application [for credit] currently receives individual scrutiny, the agencies can readily adjust loan transactions to reflect state priority rules, just as they consider other factual and legal matters before

> disbursing Government funds . . . . Since there is no indication that variant state priority schemes would burden current methods of loan processing, we conclude that considerations of administrative convenience do not warrant adoption of a uniform federal law.

440 U.S. at 733.

For these reasons, Marine submits that the Court of Claims has misapplied the concepts of uniformity set forth by this Court in Kimbell Foods and also in United States v. Yazell, 382 U.S. 341, 344 (1966). Nothing is set forth in the opinion below to indicate how the Government's program of fostering small business participation in the defense contracting sector would be frustrated by adopting uniform state law as the federal rule in the determination of the rights of the Government and those other parties which might extend credit or do

business with such contractors. As the Court of Appeals found in Murdock:

> The state commercial codes do not frustrate the objectives of government procurement programs . . . . We recognize that the United States must have the means to acquire materials necessary for defense and other government purposes. Nevertheless, we believe the government is capable of protecting itself within the framework of state commercial law.

In re Murdock Mach. & Eng. Co., 620 F.2d 767, 772 (10th Cir. 1980). Once again this Court is asked not "to override intricate state laws of general applicability on which private citizens base their daily commercial transactions." Kimbell Foods, 440 U.S. at 729.

In the context of goods and inventory financing, the nationwide adoption of the Uniform Commercial Code (U.C.C.) provides reasonably standardized rules for the protection of the Government and

other creditors of contractors with the Government. The existing regulations of the Government should be read to require minimum standards of search and verification of liens or outstanding security interests. Centralized filing and recording of financing statements are done every day by creditors across the country, with a great number of creditors operating throughout the many states. While there might be involved some additional work, it is something which this country's other federal lenders, the SBA and FHA, do daily without frustration of their specific objectives of fostering and aiding small businesses and farmers.

D. Disruption of Nationwide Commerce

The decision by the Court of Claims eliminates the certainty lenders nationwide customarily have if their borrowers

should ever deal with the Government and could cause substantial disruptions in established commercial practices. It permits the "dealing [of] Government 'wild cards' to businesses at random," found unjust by the Tenth Circuit in In re Murdock Mach. & Eng'r Co., 620 F.2d 767, 772 (10th Cir. 1980):

> Many of the reasons which support the holding in Kimbell Foods persuade us that we must adopt state law as the rule of decision in this case. State commercial codes control the mainstream of business life in this country. These codified rights and duties allow business to work within the framework of a settled, predictable environment. Thus, businessmen reasonably rely on the availability of those rights and duties unless otherwise agreed. [citation omitted].
>
> * * *
>
> In our view, if the government is allowed greater rights in the marketplace than others, then in every sale, including those between private parties, it becomes . . . relevant, and perhaps

> critical, to probe whether the Government is somehow secretly involved. Once government involvement is discovered, the peculiar legal effect of such involvement . . . must be ascertained . . . . Mindful of the burdens of time and expense such investigations would impose on our nation's commerce, and the injustice which would result by dealing government 'wild cards' to businessmen at random, we are not inclined to create a special commercial law for the government's benefit.

Id. at 772. In such an environment of hidden Government liens, lenders to small businesses contracting with the Government must make credit decisions which could easily result in the curtailment of credit to such businesses. This consequence is clearly an anomaly in light of the fact that the current progress payment legislation was designed to help small businesses have greater access to the government contracting business. [1958] U.S. Code

Cong. & Admin. News, supra at 4021, 4023, 4029.

With readily available reporting services outlining the U.C.C. in each state, and the relative uniform nature of the U.C.C., the Government's burden is not one it failed to recognize when its regulations are examined. The Government's own regulations presently call for the contracting officers to verify the existence of prior liens to insure the protection of the Government. See 32 C.F.R. § 163.94. This requirement is very similar to the SBA Manual's instructions cited by this Court in Kimbell Foods. As this Court noted:

> Thus, the agencies' own operating practices belie their assertion that a federal rule of priority is needed to avoid the administrative burden created by disparate state commercial rules.

440 U.S. at 732.

The Court of Claims, in adopting a unique federal rule of priority for unrecorded liens in favor of the Government in this case, did so largely upon the assumption that the interest of the Government constituted a "purchase money security interest" so that the prior creditors of Bond were not adversely affected by such a rule. This assumption clearly is erroneous upon examination.

In this case, progress payments were made to Bond at a rate of eighty-five percent (85%) of the value of the work completed as its work on the Government contracts progressed. Thus, materials had to be purchased and manufacturing begun before the Government would advance any funds to Bond. In the opinion of the Court of Claims, this type of financing "increases the value of Bond's assets [so that] it was

fair and appropriate that the government should be given priority with respect to the additional value its own monetary advances created." 687 F.2d at 407 (Friedman, C. J., concurring). In addition, the Court of Claims believed this rule followed the "modern practice of giving priority to purchase money interests . . . ." 687 F.2d at 404.

The U.C.C. recognizes two basic types of purchase money security interests. The first type results in a debtor receiving property subject to a lien in favor of his seller. See, e.g., Va. Code (U.C.C.) § 8.9-107(a). In this context, the creditors of the buyer are arguably no worse off. The debtor has acquired additional property, although it is subject to liens in favor of the seller. See also Va. Code § 8.2-402. The second category of purchase money

security interests involves those taken by a person who makes advances or incurs obligations or gives value to enable a debtor to acquire collateral if such value is in fact so used. See, e.g., Va. Code (U.C.C.) § 8.9-107(b). In this case, if a lender advances funds and those funds are used to purchase inventory, then the lien securing those advances constitutes a purchase money security interest. As in the first case, the assets of the debtor have been increased and certain protections are afforded that lender.

In this case, however, the Government's interest is not a purchase money security interest. Funds were not advanced to Bonú to acquire additional goods; they were advanced to be applied against eight-five percent (85%) of the value of the goods in place. In reali-

ty, they constituted working capital, and the Government's interest constituted a floating lien on inventory.

In light of these considerations, the holding by the Court of Claims is neither fair nor appropriate, and the modern trend, as evidenced by the U.C.C., does not give unrecorded and subordinate security interests priority even if they are purchase money security interests, except in very limited circumstances. See, e.g., Va. Code (U.C.C.) §§ 8.9-301, 8.9-312. The lender who makes advances or extends credit against a floating lien is often the one who already has put value into the goods which the purchaser ultimately buys. In these Government contracts, payments would not occur until after the Government verified and approved the costs incurred for a particular con-

tract. See 32 C.F.R. § 163.79-2; Marine Midland Bank v. United States, 687 F.2d at 397. By the very nature of the process, the lender providing operating capital to a business could well have its funds disbursed to the contractor in advance of the Government's payments in order to provide funds for early payment discounts from the Contractor's vendors or to supply operating capital, only to have its security impaired by the unrecorded Government contracts. While the Court of Claims suggests that this could be resolved by the lender asking the borrowers whether they contract with the Government, it would provide little comfort or protection to a lender who would receive a negative or fraudulent response when the loan is made or application submitted and then have its customer contract with the Government.

Under the holding of the Court of Claims, it follows that a prudent, secured lender loses the effectiveness of its lien to the subsequent, undisclosed lien of the Government. To avoid this very problem, the U.C.C. has established clearly defined rules which provide protection to inventory financiers and purchase money security interests. See, e.g., Va. Code (U.C.C.) § 8.9-301(2).

In this case, there are two creditors both extending credit against the inventory of Bond. The Virginia U.C.C., as most other states, has addressed this problem and created uniform rules for the protection of all parties. Following the first-to-file and notice concepts of the U.C.C., if the Government's interest is held to be a floating lien on inventory, it is subordinate to a

prior perfected security interest because of its failure to take the simple step of filing a financing statement. See, e.g., Va. Code (U.C.C.) § 8.9-301. Even if the Court finds that the Government's interest is a purchase money security interest, it has failed to avail itself of the limited protection afforded such creditors. See, e.g., Va. Code (U.C.C.) § 8.9-312(3).

Despite the reasoning of the Court of Claims, this case creates the potential for tremendous harm to creditors of Government contractors. With unrecorded liens and title-passing provisions purporting to interject in over 10,000 contracts nationally the Government's interest in property at a very early stage, how will other creditors, secured and unsecured, know whether the goods or inventories of the contractor are his or

someone else's? The very disruption of established commercial practices recognized by Kimbell Foods would result:

> Creditors who justifiably rely on state law to obtain superior liens would have their expectations thwarted whenever a federal contractual security interest suddenly appeared and took precedence.

440 U.S. at 739 & n. 42.

E. The Application of State Law: Lien and Title Theories

Given that uniform state law such as the Virginia U.C.C. should be adopted as the federal rule, the relative rights of Marine and the United States in this particular case must be determined. Clearly, it is the law of Virginia which should control, as Virginia is the state in which Bond conducted its business and in which the Collateral was located. Central to this analysis is Marine's position that, whether the title-vesting provisions are construed to pass title

or to create a lien, Marine's security interest arose prior to either event, and the taking of property subject to Marine's lien properly perfected under Virginia law constitutes a compensable taking under this Court's decision in Armstrong v. United States, 364 U.S. 40 (1960); accord, Aetna Cas. & Surety Co. v. United States, 655 F.2d 1047, 1057 (Ct. Cl. 1981).

The Court of Claims correctly interpreted the effect of the title-vesting clause and the regulatory scheme under which it was issued to create a lien, rather than providing for the passing of title. The substantial elements of ownership remained with Bond: possession, risk of loss, excess property, etc. 687 F.2d at 399. Once the transaction is properly characterized as the creation of a lien for

the Government to secure the performance of Bond, the relative priorities of the competing liens of Marine and the United States must be ascertained.

As indicated, Congress has not determined to make the lien in favor of the United States superior to any state-created or authorized liens. Thus, with no congressional mandate of priority, state law should be applied. As the United States failed to perfect its lien under the Virginia U.C.C., its rights are subordinate to a prior perfected security interest in favor of Marine. Va. Code (U.C.C.) § 8.9-301. While there are steps which the Government could have taken to protect its interests, such as filing and notifying prior inventory lienholders, Va. Code (U.C.C.) § 8.9-312, it elected not to do so. When the Government took possession

of the Collateral, therefore, it was subject to the lien in favor of Marine and it is required to pay to Marine the value of its Collateral, $250,000.00.

While the Court of Claims correctly concluded that the interest of the Government was a lien and not a transfer of title, the result does not change even if the title-vesting clause were construed to transfer title rather than create a lien. If title passed to the Government, the inquiry then must be focused on when title passed and whether Marine's security interest was perfected at the time of passage. To determine exactly when title passed, the specific contract language relied upon by the Government is important:

> (d) Title. Immediately, upon the date of this contract, title to all parts . . . theretofore acquired or produced by the Contractor and

> allocable [allocated][7] or properly chargeable to this contract under sound and generally accepted accounting principles and practices shall forthwith vest in the Government; and title to all like property thereafter acquired or produced by the Contractor and allocated or properly chargeable to this contract as aforesaid shall forthwith vest in the Government upon said acquisition, production, or allocation . . . .

32 C.F.R. § 163.79-2.

The title-vesting clause makes it quite clear that the vesting of title is broken down between those goods on hand at the time of the execution of the contract and those acquired afterwards. With regard to the former, title vests upon the allocation to the particular contract upon the date of the contract. As to property "thereafter acquired,"

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[7] See n. 5 supra at p. 7.

title passes after the acquisition of property "allocable" to the contract. While the current regulations use the word "allocated," instead of the word "allocable,"[8] a matter of substance, Marine submits that for timing and priority purposes, the result would be the same. The title-vesting clause clearly contemplates an affirmative act of acquiring goods which, if already owned at the time of the contract, must then be allocated to the particular contract. For goods not in place on the execution of the contract, they must be of a character allocable to the contract and must be acquired by Bond. Upon such acquisition, title "shall forthwith vest" in the Government.

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[8] See n. 5 supra at p. 7.

Under the Virginia U.C.C., the security interest of Marine attached prior to the time the Government acquired title and even prior to Bond acquiring title. Marine's security interest in the Collateral attached upon the occurrence of three events: when Bond signed the security agreements; when "value" had been given by Marine; and when Bond had rights in the Collateral. Va. Code (U.C.C.) § 8.9-204. The actual passage of title need not have occurred prior to the attachment of Marine's security interest. In this case, the security agreements unquestionably were signed and Marine gave "value" when it extended credit to United. Va. Code (U.C.C.) § 8.1-201(44).

Contrary to the purported passing of title to the Government, which could

not occur until Bond itself acquired title, the floating inventory lien under the Virginia U.C.C. attaches not upon acquisition of the goods by the debtor, but when it has "rights" in the Collateral. This event occurs as early as when the debtor's vendor has "identified" the goods which the debtor ordered. See Va. Code (U.C.C.) §§ 8.2-501, 502. In addition, Bond's rights in the Collateral arose when title was transferred by delivery, Va. Code (U.C.C.) § 8.2-401(2), or shipment, Va. Code (U.C.C.) § 8.2-401(2)(a). Upon the happening of any of these events, which of necessity preceded the actual transfer of title to the Government, Marine's security interest attached. As this preceded the passage of title to the Government, this Court's decision in Armstrong v. United States, 364 U.S. 40

(1960) requires that Marine's interest be protected under the Fifth Amendment and, while Marine cannot stop the Government's obtaining possession of the Collateral, Marine is entitled to the value of its property interest, which in this case exceeded the value of the Collateral of $250,000.00.

Not only is Marine entitled to recover under the above analysis, it is also entitled to recover by reason of the failure of the Government to record either a financing statement or a bill of sale or contract with respect to the Collateral. Under Virginia law, as in other states, when a buyer permits the seller to retain possession of the goods and chattels, that contract is void as to purchasers for value of those goods without notice of the claim and to creditors (Va. Code § 11-1), unless it

is recorded or a security interest is perfected under the U.C.C. as adopted in the state. See Va. Code § 55-95, 55-96.

The Government has admitted that it never recorded financing statements or the Government contracts. It is also clear that it purported to purchase goods from Bond while leaving those goods in Bond's hands. Under Virginia law, therefore, Marine's interest is paramount to that of the Government's, and there has been a compensable taking of Marine's property by the Government.

Certainly the policy behind such pervasive state law is clear. Contractors with the Government may carry substantial inventories of supplies, parts, and work in progress, not all of which may be readily discernible to be used exclusively for Government contracts. Contractors

holding such property may mislead the public at large as to the nature of their assets. Suppliers and creditors customarily extend credit partly on the assumption that these supplies and inventories will be available to satisfy their claims in the event of the insolvency of the contractor. To avoid a possible fraud upon such creditors and suppliers, Virginia law (as most states) requires the simple filing of notices to the public either in the form of a lien or, if title is transferred, in the form of a bill of sale. Thus, a record search by the diligent creditor allows it to proceed with certain expectations as to the contractor's assets.

CONCLUSION

The Tenth Circuit, in the case of In re Murdock Mach. & Eng'r. Co., 620

F.2d 767 (10th Cir. 1980), correctly evaluated the risks of these "hidden title" clauses used by the Government and their impact on nationwide commercial practices. In doing so, its balancing of the factors required in Kimbell Foods in favor of requiring the Defense Department's procurement activities to comport with requirements of uniform state law are more consistent with Kimbell Foods than the holding of the Court of Claims below. The considerations underlying this Court's decision in Kimbell Foods and the Tenth Circuit's decision in Murdock are strikingly apposite to this case. First, state law, and in particular, state uniform commercial codes, provide the appropriate rules of decision. Second, the Government should not be entitled to a special commercial law.

Third, the application of the state commercial laws would not frustrate the objectives of Government procurement nor hinder its acquisition of defense interests. Fourth and last, extensive changes in Government procurement operations would not be necessary with the adoption of uniform state law as the federal rule of priority. These principles control in this case and the Court of Claims erred in not following them as prescribed by this Court in Kimbell Foods and correctly applied in Murdock.

The questions presented in this case are ones of first impression for this Court. To correct the misapplication of Kimbell Foods by the Court of Claims and to resolve the conflict of the decision below with the Tenth Circuit's decision in Murdock and for

the reasons already stated, a writ of certiorari should be granted.

Respectfully submitted,

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Certificate of Service

I hereby certify that three copies of the foregoing Petition for Writ of Certiorari and accompanying appendix was mailed first class, postage prepaid to the Solicitor General of the United

States, Department of Justice, Washington, D.C. 20530 this 17th day of December, 1982.

Of Counsel for
Marine Midland Bank

IN THE

Supreme Court of the United States

October Term, 1982

MARINE MIDLAND BANK,

Petitioner,

v.

THE UNITED STATES,

Respondent.

APPENDIX

In the United States Court of Claims

No. 308-81C

(Decided August 25, 1982)

MARINE MIDLAND BANK v. THE UNITED STATES

George H. Roberts, Jr., attorney of record, for plaintiff. *Ronald D. Hodges* and *Wharton, Aldhizer & Weaver*, of counsel.

William Douglas White, with whom was *Assistant Attorney General J. Paul McGrath*, for defendant. *Anthony Sadowski*, Department of Defense, of counsel.

Before FRIEDMAN, *Chief Judge*, KASHIWA and BENNETT, *Judges*.

ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

BENNETT, *Judge*, delivered the opinion of the court:

This case presents several difficult and interesting questions of first impression: (1) under the standard "title vesting" clause for federal procurement contracts, what is the nature of the interest taken by the government to secure its progress payments to a contractor, and (2) upon the insolvency of a contractor to which such payments have

been made, what is the resolution of the conflict between that interest and a floating lien security interest of a general creditor of the contractor? The case is now before the court on cross-motions for summary judgment, and there has been briefing and oral argument. We conclude: (1) that the government takes an interest in the nature of a lien, and (2) that such lien is paramount to private floating liens. As will be explained fully below, since the collateral in this case did not have value in excess of the government's lien interest, this results in a holding for defendant.

On December 20, 1977, Bond Trailer Division, Inc., a Virginia company, executed a written guarantee to plaintiff Marine Midland Bank to pay certain indebtedness to plaintiff of a third party. Bond secured this guarantee by executing a floating lien security interest[1] in favor of plaintiff, allegedly perfected by plaintiff under applicable state law by January 9, 1978.

Bond was exclusively a government contractor, engaged in the production of munition trailers for the Air Force and the Navy. Bond's two contracts with the Air Force were dated June 30, 1976, and March 3, 1978, and its contract with the Navy was dated May 9, 1978. All three of these contracts, whether by their original terms or by amendment, included a clause which provides that upon the government's making of progress payments title shall "forthwith vest" in the government:

> to all parts; materials; inventories; work in progress * * * theretofore acquired or produced by the Contractor and allocated or properly chargeable to this contract under sound and generally accepted accounting principles and practices * * * [and] to all like property thereafter acquired or produced by the Contractor as aforesaid * * * upon said acquisition, production or allocation.

This clause is from federal procurement regulations, 32 C.F.R. § 163.79–2 (1981), and pertinent parts thereof are included as an appendix to this opinion.

The dispute in this case arose when the party for which Bond was acting as guarantor defaulted under its obliga-

[1] Such an interest covers not only the debtor's present plant, machinery and inventory but also attaches to after-acquired property. The lien "floats" over whatever the debtor has or acquires.

tions to plaintiff. Upon plaintiff's subsequent demand upon Bond, and Bond's refusal to pay, plaintiff instituted proceedings in May 1979, in state court in Virginia, to obtain physical possession of Bond's collateral. This basically was its plant and all of its inventory, as covered by the floating lien. In June 1979, however, the United States intervened in the state proceedings, claiming that plaintiff could not take possession of the inventory because it belonged to the government pursuant to the title vesting clauses in its contracts. The case was then removed to the United States District Court for the Western District of Virginia. Those proceedings were stayed in their turn when Bond initiated bankruptcy proceedings in the bankruptcy court in that district, and the result of that action, as pertinent to the case as it now stands before this court, was that the property claimed both by plaintiff and the government was abandoned by the bankruptcy court under an agreement between plaintiff and defendant that defendant would take possession of the inventory subject to defendant's payment of $250,000 should it be judicially determined that plaintiff's security interest was paramount to the interest asserted by the government. The district court then transferred the case here for that determination.

As a preliminary matter, we note that it is indisputable that physical possession of Bond's inventory is properly with the government. *United States* v. *Ansonia Brass & Copper Co.*, 218 U.S. 452 (1910). Especially when defense procurement is involved, the government's title vesting provisions certainly operate to prevent the actual possession of goods contracted for by the government from passing to anyone else. *United States* v. *Digital Prod. Corp.*, 624 F.2d 690 (5th Cir. 1980); *In re American Boiler Works, Inc.*, 220 F.2d 319 (3d Cir. 1955). It is also indisputable that the government's taking of possession put the collateral beyond the reach of any interest that plaintiff may have had. "[Government] property, for the most obvious reasons of public policy, cannot be seized by authority of another sovereignty against the consent of the Government." *Ansonia Brass & Copper Co.*, 218 U.S. at 471. Plaintiff claims, however, that the extinction of its interest in the collateral is compensable as a fifth amendment taking, under the rule of *Armstrong* v. *United States*, 364 U.S. 40 (1960) (where the

government takes title to property, to which a valid lien had attached, the lien is extinguished and its value is recoverable in an action for taking).

I

Of initial, and critical, importance in this case is the nature of the interest taken by the government for its payment of progress payments. If the government took title to Bond's inventory, in the traditional sense, then it becomes important whether plaintiff's lien attached before title vested. If so, then plaintiff's interest was compensably taken, under *Armstrong*. If not, then plaintiff's lien never actually had anything to attach to because the property belonged to the government. Plaintiff would have no recovery in that situation. If, however, the government took a lien interest, instead of traditional title, then the next question becomes one of priorities, whether it is the government's lien or plaintiff's that is paramount. These are widely divergent lines of inquiry.

Defendant argues that the plain meaning of its title vesting clause is that the government takes title in the traditional sense, that the government simply owns inventory subject to the operation of the clause. Plaintiff, on the other hand, argues that a full reading of the clause, and of the regulations that govern its use, shows that the government means only to take a security interest to secure its progress payments, and that title in the traditional sense is not contemplated at all.

Plaintiff's assertion is the correct one. As will be made clear, the progress payments in this case were loans from the government to Bond, to be repaid by withholding an appropriate amount of the contract price ultimately owing on full performance. In the interim, the government took an interest in Bond's inventory as security, as defined by the title vesting clause. This interest was far less than full ownership.

The title vesting clause comes from 32 C.F.R. Part 163, entitled "Defense Contract Financing Regulations," which implements the authorization under 10 U.S.C. § 2307 (1976)

for agencies to make advance, partial, progress and other payments to government contractors.[3] The regulatory structure that Part 163 sets up is a detailed and complex framework for advancing funds to contractors under appropriate guidelines and protections. The goal of the system, as articulated in Subpart B—"Basic Policies" is "[t]he providing of funds for payment of expenses of performance of contracts [as] an essential element of defense production." Section 163.18. Further, "Prudent contract financing supports procurement and production * * * by providing necessary funds to supplement other funds available to contractors for contract performance." *Id.* Recognizing the risks inherent in loaning money, however, the regulations provide that such financing must be designed to minimize monetary loss to the government. Section 163.19. The various types of advance payments are granted only in a set order of preference, all of which succeed private financing on reasonable terms, section 163.22, and financing is not allowed at all unless the contractor appears properly creditworthy. Sections 163.24 and 163.27.

Financing through progress payments is conditioned on use of the title vesting clause at issue in this case. Section 163.79. "Title" to a contractor's inventory is taken by the government to secure the advance of progress payments, which the contractor repays by having the sum of the progress payments deducted from amounts due upon final performance. Sections 163.81 and 163.81–3. While defendant argues that this scheme has the government "buy" a contractor's inventory with its progress payments, this is not how the regulations read. Progress payments are made, and then they are "liquidated" by decreasing the contract price. *Id.* They are not partial purchases, but loans.[3]

This conclusion is reinforced by the text of the title vesting clause itself,[4] which makes clear that the govern-

[3] Without this statutory authority some such payments, and perhaps all such, would violate the prohibition on advances of public money, codified at 31 U.S.C. § 529 (1976). *See* C.S. McClelland, *The Illegality of Progress Payments as a Means of Financing Government Contractors*, 33 NOTRE DAME LAW. 360 (1968).

[3] Note also that "When deemed reasonably necessary for the protection of the Government, the [title vesting clause] may be supplemented by additional protective provisions, such as personal or corporate guarantees, subordinations or standbys of indebtedness, special bank accounts, and other protective covenants * * *." 32 C.F.R. § 163.80–5. Such language is not consistent with a purchase theory.

[4] Reprinted as an appendix to this opinion.

ment does not take ownership to the covered inventory in any normal sense of the word. According to paragraph (d) of the clause: (1) title transfer does not affect the "handling and disposition" of covered property under other sections of the contract; (2) production scrap may be sold without the government's approval; (3) upon completion of the contract, title will revest in the contractor to any covered materials that were not incorporated into the final product; and (4) the government will accept no inventory-related liability for the covered inventory. Paragraph (e) of the clause keeps the risk of loss on the contractor unless expressly assumed by the government, and paragraph (h) allows the government, upon declaring default, to force the revesting of inventory in the contractor by compelling the repayment of progress payments. "Title" is meant to carry no risks for the government and is shifted back to the contractor when it would be unneeded or undesired. In short, the government takes an interest in the contractor's inventory but does not want, and does not take, any of the responsibilities that go with ownership.

The question raised, then, is what title vesting means for the purposes of the government's financing program, when it is evident that "title" is not used literally in the title vesting clause or the regulations. Indeed it would do violence to the system that the clause and regulations set up to say that the government "owns" covered property when it is apparent that the government specifically exempts itself from most of the incidents of ownership. Reading the clause and all of the regulations together, it is plain that ownership is not taken, but rather that the government takes a security interest in the contractor's inventory, to secure the funds loaned to the contractor through progress payments. Such an interest is readily identifiable in common parlance as a lien, as plaintiff argues, despite the use of the term "title."

By way of rebuttal, defendant presses on this court a number of cases in which courts seem to have read "title" for its plain meaning, and suggests that these cases be followed here. We read some of these cases, however, to involve only the special right of the government to take possession of property that it has contracted for and not to involve any of the general aspects of title as the word is

commmonly used. Such cases should not be read for more than what they are. Other cases show only why the government originally chose and used the word "title," for legal settings that are no longer current, and we do not find them to have present applicability. None of these cases deals with title as ownership, and none of them is inconsistent with deciding in the case before us that the government took a lien on Bond's inventory, as measured by the progress payments advanced to Bond.

The most readily explained of the government's cases are those which do not involve any competing claims in the value of property that the government has contracted for and only involve the government's right to the physical possession of that property upon the bankruptcy of the contractor. As we have said earlier, the government's right to possess such property cannot be questioned, and it is entirely accurate and appropriate for an opinion in a case that is solely on possession to recite that "title means title." The possessory aspect of traditional title is indisputably encompassed by "title" as it is used in the title vesting clause, at least to insure possession upon a contractor's insolvency, but these cases say nothing on whether other attributes of traditional title are also encompassed by the term. No other issue than mere possession is present. We see that it involves no inconsistency to say that "title" under the title vesting clause gives the government a possessory right and still to leave open whether another party must be compensated for a lost interest.

An illustration of a case purely on possession is *United States* v. *Ansonia Brass & Copper Co.*, 218 U.S. 452 (1910), where workmen's and materialmen's liens were argued as validly attaching to a ship, built by a contractor that had become insolvent, to which the government had taken title. This argument was rejected with the passage quoted earlier in this opinion, that no interest deriving from a sovereignty other than the United States can be forced onto United States property without the government's consent. *Id.* at 471. The Supreme Court was clear that the government's actual possession of the ship could not be interfered with, and for that purpose the government's "title" included a possessory right. It is important, however, that the value of the workmen's and materialmen's liens was not a part of

the case—only whether those liens could attach to government property. The Court was not presented with an argument that the extinction of the liens upon the government's possession of the ship was compensable as a taking, such as plaintiff argues in the present case, and the Court's opinion should not be read to indicate any negative inference. *See Armstrong* v. *United States*, 364 U.S. 40 (1960) (explaining this aspect of *Ansonia*).

Similar cases, involving only possession, are ones between the government and a bankrupt contractor's trustee in bankruptcy, when the trustee attempts to sequester property that is covered by a title vesting clause. Such attempts are perfunctorily dismissed because the government's right to the physical possession of such property simply cannot be defeated. *See United States* v. *Digital Prod. Corp.*, 624 F.2d 690 (5th Cir. 1980); *In re American Boiler Works, Inc.*, 220 F.2d 319 (3d Cir. 1955). In none of these cases, however, is there an issue of the value of the property, and they have no applicability to the case now before us, where plaintiff does not dispute the government's possession of Bond's inventory and claims only under the fifth amendment that the government's possession has resulted in a taking of the value of its loan.

Another category of cases argued by the government is represented by *Boeing Co.* v. *United States*, 168 Ct. Cl. 109, 338 F.2d 342 (1964), *cert. denied*, 380 U.S. 972 (1965). Although the particular legal issue in *Boeing* involved the tax consequences of title vesting, the opinion includes a discussion of "title" as lien, which characterization is rejected in favor of a more literal reading of title. While this seems directly contrary to the conclusion reached in the present case, *Boeing* comes from a legal setting in which it was necessary to characterize title vesting fairly literally in order to preserve the legality of the government's practice of making progress payments, and this explains the difference. To understand *Boeing* properly is to begin to understand why the word "title" was originally chosen by the government and why a literal reading no longer makes sense.

In 1823 Congress enacted a strict prohibition on advances of government funds, Pub. L. No. 17-9, 3 Stat. 723, and it is still on the books, in only slightly amended form, at 31

U.S.C. § 529: "No advance of public money shall be made in any case unless authorized by the appropriation concerned or other law." For the field of government contracts, the plain result of this prohibition was to ban advance payments, partial payments, progress payments and other types of payments advanced to contractors before contract completion, and a way around it became necessary if such payments were to be made, as difficult procurements seemed at times to require. The government's title vesting program was developed as the answer, conditioning progress payments on the vesting of title, on the theory that there was no "advance" of public money if the government took something of value for its payments. And it was important to this system to construe the government's vesting of title literally, in order to make progress payments look like partial purchases. *See* C.S. McClelland, *The Illegality of Progress Payments as a Means of Financing Government Contractors*, 33 NOTRE DAME LAW. 380 (1958).

In 1948, however, Congress began to narrow the prohibition, by enacting a specific exception to allow advance payments to contractors on negotiated contracts for military procurement. Armed Services Procurement Act of 1947, Pub. L. No. 80–65, 62 Stat. 21. This was followed one year later with a very similar provision for nonmilitary procurement, Federal Property and Administrative Services Act of 1949, Pub. L. No. 81–288, 63 Stat. 377 (1949), and finally, in 1958, Congress wholly abrogated the prohibition by broadening the allowance to progress payments, partial payments and other payments and by extending the coverage to advertised contracts as well, both military and nonmilitary. Pub. L. No. 85–800, 72 Stat. 967 (codified at 10 U.S.C. § 2307 and at 41 U.S.C. § 255).

The 1958 enactment, then, removed the reason that title vesting had been construed literally before, because it removed the need to make progress payments appear like partial purchases. The 1958 Act cleared the way for just the type of examination of the title vesting clause and regulations that we engaged in earlier in this opinion, to determine exactly the kind of interest that the government has provided for itself. That examination concluded that the interest plainly is not ownership and has the nature of a lien. Thus, although we understand why the word "title" is

used in the clause, for what was once a very important purpose, we see no present reason to call the government's lien interest anything other than what it is, as the clause and regulations show it to be.

This background explains *Boeing*, which involved contracts dated before the 1958 legislation, and so a literal reading of "title" for the purposes of title vesting was still necessary. We only need note for the present case that the contracts were entered into after 1958 and that it would not be reasonable to read the present title vesting clause and supporting regulations literally at all, as we have discussed at length above.

The government presses another case, *In re Double H Prod. Corp.*, 462 F.2d 52 (3rd Cir. 1972), which also seems to read title vesting according to a plain meaning, even though it deals with post-1958 contracts. *Double H* is much like the present case, involving the government and a floating lien creditor of a bankrupt contractor, and the opinion rejects an argument that the government's interest should have a lien characterization. We read *Double H*, however, to do no more than to illustrate yet another ground on which the government's use of the word "title" was important, but now is largely outdated.

The revised version of Article Nine, "Secured Transactions," of the Uniform Commercial Code was put forth only 10 years ago, and it has received widespread acceptance only in the last 5 years.[5] One of the principal reforms of the new Article Nine was the establishment of a coordinated system for setting the priority of competing security interests, and it eliminated the need for many of the fictional devices that were used to circumvent certain inequities and inconsistencies in the old system. It is one of these now outmoded devices that concerns us.

Before Article Nine's changes, a lien interest taken by a purchase money lender[6] often was subordinated to the

[5] Article Nine of the U.C.C. is used here only as the most complete and recent exposition of secured transactions law and theory. It is not binding on the federal government, in any case in which federal law controls, unless adopted by a court as a source for federal rules of decision, if no statute applies. *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979); *John C. Kohler Co.* v. *United States*, 204 Ct. Cl. 777, 496 F.2d 1360 (1974); *Everett Plywood & Door Corp.* v. *United States*, 190 Ct. Cl. 80, 419 F.2d 425 (1969).

[6] A purchase money lender is one who loans money for the acquisition of particular property and who takes back an interest only in that property.

floating lien interest of a pre-existing general creditor. This was unfair, however, because the value that the purchase money lender added to the debtor was not expected by the general creditor to be available as collateral—it was not present in the debtor when the general creditor calculated the amount of its loan—and it was a windfall for the law to make it subject to the general creditor's interest. It would have worked no harm to the general creditor to allow the purchase money lender simply to take out of the debtor just what it put in, thus putting the general creditor back in the position it was in when it made its loan, but it often destroyed the purchase money lender's interest to have the general creditor's interest come first.

As Comment 3 to U.C.C. §9–312 explains, purchase money lenders then had to resort to fictional devices, and a title device was most common:

> Prior law, under one or another theory, usually contrived to protect purchase money interests over after-acquired property interests * * *. For example, in the field of industrial equipment financing it was possible, by manipulation of title theory, for the purchase money financer of new equipment (under conditional sale or equipment trust) to protect himself against the claims of prior mortgagees or bondholders under an after-acquired clause in the mortgage or trust indenture: the result was arrived at on the theory that since "title" to the equipment was never in the vendee or lessee there was nothing for the lien of the mortgage to attach to.

We note that this is closely analogous to the government's position in the present case, where the government has paid money into a debtor for a specific purpose and has taken back "title" in whatever is identified to that purpose. Defendant's briefs are full of assertions, in arguing against the validity of plaintiff's lien interest, that since "title" to the contractor's inventory was vested in the government, there was nothing to which plaintiff's lien could attach. Clearly, the government simply is arguing an old title device.

Article Nine's reform of this situation is to allow purchase money lenders to come ahead of general contractors, section 9–312, and more generally to treat title devices and lien interests alike, recognizing that there is no difference in the effect that they are intended to have. Section 9–202

specifically makes title to collateral immaterial: "Each provision of this Article with regard to rights, obligations and remedies applies whether title to collateral is in the secured party or in the debtor." And the Comment to section 9–101 reinforces this: "Rights, obligations and remedies under the Article do not depend on the location of title (Section 9–202). * * * The scheme of the Article is to make distinctions, where distinctions are necessary, along functional rather than formal lines."[7] Thus *Double H* is explained, as a case on the common pre-Code practice of using a title device to avoid the inequity of giving priority, in property covered by a special loan of money, to a general creditor who would take such an interest as a windfall. This device is no longer necessary, however, given the new common understanding and treatment of purchase money interests.

Both parties also discuss the significance of *In re Murdock Mach. & Eng'r Co.*, 620 F.2d 767 (10th Cir. 1980), a case which dealt with the attempts of a government contractor's supplier to halt the delivery of steel, while still in transit, upon the supplier's discovery that the contractor had become insolvent. The dispute in the case was between the supplier and the government, with the government claiming that title to the steel had vested in the government pursuant to a title vesting clause and that it was therefore entitled to take the steel without payment. The Tenth Circuit resolved the case by finding: (1) on the special facts before it, that the state enactment of U.C.C. Article Nine applied[8] and (2) that the closest analogue in Article Nine

[7] Very importantly, this comment also recognizes that "[t]he location of title may become important for other purposes—as, for example, in determining the incidence of taxation—and in such a case the parties are left free to contract as they will." This seems directly to support our previous discussion on cases involving only the government's right to possess an insolvent contractor's inventory. For the purpose of possession, "title" is a good concept and should be given effect.

[8] The Tenth Circuit found a very strong state interest in protecting suppliers from "hidden" government title, finding that it would be a great burden for suppliers always to have to ask if a buyer were a government contractor. *Murdock*, 620 F.2d at 772–73. As will be made clearer by our discussion of *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979), in part II of this opinion, this created a strong argument for the selection of state law as the rule of decision for the case. Our case, however, does not involve a mere supplier, who may well only deal with a government contractor as one of many otherwise identical orders received on any given day. We are dealing with a lender, part of whose job is to become familiar with a prospective debtor's operations. The burden on suppliers that the Tenth Circuit found so important is not a burden on lenders, and so we do not find the discussion of *Kimbell Foods*, in *Murdock*, to be helpful in our case. We note, also, that the court in *Murdock* said

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was to the right of a supplier to halt deliveries as against the interest of a good faith purchaser for value. The supplier in *Murdock* was found to have that right, and the government was required to pay.

Murdock may seem applicable to the present case, in the analogy between the government, under its title vesting clause, and a good faith purchaser for value, because this would seem to have more in common with a "title" characterization of the government's interest under title vesting than a "lien" characterization. Apart from the great difference in the factual situation, however, which alone may be enough to distinguish *Murdock*, there is a more fundamental difference. The Tenth Circuit was faced with the task of fitting the government's title vesting practice into the complex and self-contained system of Article Nine, and it chose the good faith purchaser for value analogy as the best it could find. While this may well have been the best "fit" under the circumstances, we are not sure that it should have any applicability outside of Article Nine. As explained fully below, the federal common law, and not Article Nine, governs the present case, and construing title vesting for its purposes is very different. We do not have to fit title vesting into a system in which it was never intended to be a part. Rather we can read the government's title vesting clause and regulations for what they really are written to be, a very reasonable financing structure using paramount liens to secure progress payments. *Murdock* and our case do not conflict. The court in *Murdock* focused on the peculiar circumstances involving an innocent seller of goods to an insolvent contractor rather than on the overall problems of government procurement. It did not focus on nor did it rule on the validity of the title vesting clause as between a floating lien holder and the government.

In sum, we hold that the government's title vesting clause and regulations provide for the taking of an interest in the nature of a lien. Full title, in the plain sense, certainly is not meant, as an examination of the clause and

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specifically that: "The government has not argued in this case that its procurement programs demand a uniform federal commercial law." 620 F.2d at 772. This too makes it quite unlike the case we decide here.

regulations show. We recognize that the government's use of the word "title" has had an important history, both to avoid the ban on advances of public money and as a way to circumvent floating lien interests of general creditors, and that it has an important present use in insuring that the government may take actual possession of the inventory of a bankrupt contractor. There is no reason, however, in theory or in case law, to read the word for more than that.

II

The second major question in this case is which of the conflicting security interests in the value of Bond's inventory, the government's or the plaintiff's, should take priority. That such a question of priorities is one of federal law was settled in *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979). The only remaining issue is what the federal rule of decision should be.

The question in *Kimbell Foods* involved the conflicting security interests of private lenders and certain government agencies, the Small Business Administration (SBA) and the Farmers Home Administration (FHA). This was a question of federal common law, since the Court decided that federal law should control the ordering of priorities but also since no statute did so. *See Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943). In choosing the source of the federal rule of decision, the Court made reference to the standard practice of both the SBA and the FHA of conforming many functions to state practice and noted that general commercial lending schemes would be greatly upset if those agencies were not also to follow state laws in their lending programs. Since the Court saw little reason for federal uniformity, it concluded that the state enactments of Article Nine would be used as the federal law for the case.

Kimbell Foods specifically left open, however, the ability to fashion uniform rules in cases that required it. "Of course, formulating special rules to govern the priority of * * * federal * * * liens * * * would be justified if necessary to vindicate important national interests." 440 U.S. at 740. And especially where state practices would not

be affected by such a uniform federal rule, it is entirely reasonable and appropriate to impose one. *See id.* at 739–40.

The case before us clearly calls for a uniform rule of decision. Government procurement is not carried out from small regional offices, as the functions of the SBA and FHA often are, and individual state practices generally are not followed. Quite to the contrary, it is one of the primary purposes of the extensive and detailed regulations for federal procurement to promote standardization and uniformity throughout the federal system. Indeed, specifically for the purposes of the present case, it was the explicit desire of Congress itself, when it enacted the 1958 authorization for advance, progress, partial and other payments, that "uniform government-wide regulations * * * be developed to guide the exercise of the * * * advance payment (and progress payment) authority." [1958] U.S. CODE CONG. & AD. NEWS 4027. This desire is reflected in the implementing regulations at 32 C.F.R. § 163.16: "Uniform financing policies and, so far as practicable, uniform procedures and standard forms are to be used by the Departments * * *." Thus it is clear that *Kimbell Foods'* resort to state laws would not be appropriate in this case, as contrary to evident congressional intent and established federal practice.

The rule of decision we choose for this case is to make the government's security interest under its title vesting procedures paramount to the liens of general creditors. We believe that this merely follows the modern practice of giving priority to purchase money interests, as we consider purchase money to be closely analogous to the government's progress payments, and we lay down nothing new or unexpected. The government should be able to take out of the contractor the value that it has put in, if that value is identified with specific property, and it does not hurt a general creditor if this is done.[9] We note also that giving the government an interest only to the extent of its progress

[9] Not, at least, if the general creditor is pre-existing, because this would merely leave the general creditor with whatever the debtor had when the general loan was made. There is a slight potential for harm, however, when a general lender comes to a debtor after the government has made progress payments, because then the lender could be deceived that the value of the government's progress payments would be available to it as collateral. All a general lender would need to do in such a case, however, would be to ask the debtor if it has any government contracts, hardly a great burden.

payments prevents the government from taking possession to more value than it has put into the contractor.

In this case, since it appears from uncontested facts that the government's security interest in Bond's inventory was not fully satisfied, there is no excess value to satisfy plaintiff's lien.

Accordingly, plaintiff's motion is denied. Defendant's motion is granted. The petition is dismissed.

APPENDIX

32 C.F.R. § 163.79–2 Progress payment clause for small business concerns.

PROGRESS PAYMENT FOR SMALL BUSINESS CONCERNS (JANUARY 1972)

Progress payments shall be made to the Contractor as work progresses, from time to time upon request, in amounts approved by the Contracting Officer upon the following terms and conditions:

(a) *Computation of Amounts.* (1) Unless a smaller amount is requested, each progress payment shall be (i) eighty-five percent (85%) of the amount of the Contractor's total costs incurred under this contract plus (ii) the amount of progress payments to subcontractors as provided in (j) below; all less the sum of previous progress payments.

(2) The Contractor's total costs ((a)(1)(i)) shall be reasonable, allocable to this contract, and consistent with sound and generally accepted accounting principles and practices. However, such costs shall not include (i) any costs incurred by subcontractors or suppliers, or (ii) any payments or amounts payable to subcontracts or suppliers, except for completed work (including partial deliveries) to which the Contractor has acquired title and except for amounts paid or payable under cost-reimbursement or time and material subcontracts for work to which the Contractor has acquired title, or (iii) costs ordinarily capitalized and subject to depreciation or amortization except for the properly depreciated or amortized portion of such costs.

(3) The amount of unliquidated progress payments shall not exceed the lesser of (i) 85 percent of the costs mentioned in (a)(1)(i) above, plus any unliquidated progress payments mentioned in item (a)(1)(ii) above, both of which are applicable only to the supplies and services not yet delivered and invoiced to and accepted by the Government, or (ii) 85 percent of the total contract price of supplies and services not yet delivered and invoiced to and accepted by the Government, less unliquidated advance payments.

(4) The aggregate amount of progress payments made shall not exceed 85 percent of the total contract price.

(5) If at any time a progress payment or the unliquidated progress payments exceed the amount permitted by this paragraph (a), the Contractor shall pay the amount of such excess to the Government upon demand.

(b) *Liquidation.* Except as provided in the clause entitled "Termination for Convenience of the Government," all progress payments shall be liquidated by deducting from any payment under this contract, other than advance or progress, the amount of unliquidated progress payments, or 85 percent[1] of the gross amount invoiced, whichever is less. Repayment to the Government required by a retroactive price reduction will be made after calculating liquidations and payments on past invoices at the reduced prices and adjusting the unliquidated progress payments accordingly.

(c) *Reduction or Suspension.* The Contracting Officer may reduce or suspend progress payments, or liquidate them at a rate higher than the percentage stated in (b) above, or both, whenever he finds upon substantial evidence that the Contractor (i) has failed to comply with any material requirement of this contract, (ii) has so failed to make progress, or is in such unsatisfactory financial condition, as to endanger performance of this contract, (iii) has allocated inventory to this contract substantially exceeding reasonable requirements, (iv) is delinquent in payment of the costs of performance of this contract in the ordinary course of business, (v) has so failed to make progress that the unliquidated progress payments exceed the fair value of the work accomplished on the undelivered portion of this contract, or (vi) is realizing less profit than the estimated profit used for establishing a liquidation percentage in paragraph (b), if that liquidation percentage is less than the percentage stated in paragraph (a)(1).

(d) *Title.* Immediately, upon the date of this contract, title to all parts; materials; inventories; work in process; special tooling as defined in the clause of this contract entitled "Special Tooling"; special test equipment and other special tooling to which the Government is to acquire title pursuant to any other provision of this contract; nondurable (*i.e.*, noncapital) tools, jigs, dies, fixtures, molds, patterns, taps, gauges, test equipment, and other similar

[1] For lower percentages for this paragraph (b) and for (a)(3)(ii) and (a)(4), see § 163.81-2.

manufacturing aids title to which is not obtained as special tooling pursuant to this paragraph; and drawings and technical data (to the extent delivery thereof to the Government is required by other provisions of this contract); theretofore acquired or produced by the Contractor and allocated or properly chargeable to this contract under sound and generally accepted accounting principles and practices shall forthwith vest in the Government; and title to all like property thereafter acquired or produced by the Contractor and allocated or properly chargeable to this contract as aforesaid shall forthwith vest in the Government upon said acquisition, production or allocation. Notwithstanding that title to property is in the Government through the operation of this clause, the handling and disposition of such property shall be determined by the applicable provisions of this contract such as: the Default clause and paragraph (h) of this clause; Termination for Convenience of the Government clause; and the Special Tooling clause. Current production scrap may be sold by the Contractor without approval of the Contracting Officer and the proceeds shall be credited against the costs of contract performance. With the consent of the Contracting Officer and on terms approved by him, the Contractor may acquire or dispose of property to which title is vested in the Government pursuant to this clause, and in that event, the costs allocable to the property so transferred from this contract shall be eliminated from the costs of the contract performance and the Contractor shall repay to the Government (by cash or credit memorandum) an amount equal to the unliquidated progress payments allocable to the property so transferred. Upon completion of performance of all the obligations of the Contractor under this contract, including liquidation of all progress payments hereunder, title to all property (or the proceeds thereof) which had not been delivered to, and accepted by the Government under this contract or which had not been incorporated in supplies delivered to and accepted by the Government under this contract and to which title has vested in the Government under this clause shall vest in the Contractor. The provisions of this contract referring to or defining liability for Government-furnished property shall not apply

to property to which the Government shall have acquired title solely by virtue of the provisions of this clause.

(e) *Risk of Loss.* Except to the extent that the Government shall have otherwise expressly assumed the risk of loss of property, title to which rests in the Government pursuant to this clause, in the event of the loss, theft or destruction of or damage to any such property before its delivery to and acceptance by the Government, the Contractor shall bear the risk of loss and shall repay the Government an amount equal to the unliquidated progress payments based on costs allocable to such lost, stolen, destroyed or damaged property.

* * * * *

(h) *Special Provisions Regarding Default.* If this contract is terminated pursuant to the clause entitled "Default," (i) the Contractor shall, upon demand, pay to the Government the amount of unliquidated progress payments and (ii) with respect to all property as to which the Government elects not to require delivery under the clause entitled "Default," title shall vest in the Contractor upon full liquidation of progress payments, and the Government shall be liable for no payment except as provided by the "Default" clause.

(i) *Reservations of Rights.* The rights and remedies of the Government provided in this clause shall not be exclusive, and are in addition to any other rights and remedies provided by law or under this contract. No payment, or vesting of title pursuant to this clause, shall excuse the Contractor from performance of his obligations under this contract, nor constitute a waiver of any of the rights and remedies of the parties under this contract. No delay or failure of the Government in exercising any right, power or privilege under this clause shall affect any such right, power or privilege, nor shall any single or partial exercise thereof preclude or impair any further exercise thereof or the exercise of any other right, power or privilege of the Government.

* * * * *

☆ U.S. Government Printing Office: 361-818/1014

FRIEDMAN, *Chief Judge*, concurring:

In one respect the court's analysis produces a paradoxical result. The court recognizes that if the government had title to Bond's property and if the plaintiff's lien on that property attached before the government's title vested, the invalidation of the plaintiff's lien by the government's title would constitute a compensable taking by the United States of the plaintiff's security interest. The court holds, however, that although the government purported to "acquire title" to the property, in fact it acquired only a lien to secure the progress payments it made. The court then holds that, as a matter of federal law, the government's security interest prevails over the plaintiff's state-created lien without regard to whether that lien antedated the government's. The result is that the lesser security interest the government has in Bond's property as a result of the court's holding (a lien on, rather than title to, the property), gives the government greater rights in that property (priority for its lien over the plaintiff's possibly prior lien) than it would have had if it had title.

The reason for this result, however, is convincing. The government obtains a lien only to secure its progress payments. Those payments necessarily increase the value of Bond's assets. Accordingly, it is fair and appropriate that the government should be given priority with respect to the additional value its own monetary advances created. That is all the court's decision does.

As a matter of federal procurement law and policy, there is no convincing reason why the plaintiff's floating lien should prevail over the government with respect to property values the government created. By definition the plaintiff could not have looked to those subsequently created values to protect its claim at the time its security interest arose. No unfairness results from protecting the federal interest by thus limiting the reach of the plaintiff's lien.

☆ U.S. Government Printing Office: 361-518/1014

ORDER RESPECTING REHEARING

IN THE UNITED STATES
COURT OF CLAIMS

September 24, 1982

ORDER

PER CURIAM: IT IS ORDERED that the motions of the parties as set forth, for rehearing, reconsideration or other relief under Rules 7(d), 151 and 152 are DENIED:

308-81C Marine Midland Bank

Plaintiff's motion for rehearing, and suggestion for rehearing en banc filed September 8, 1982, of opinion dated August 25, 1982. (FRIEDMAN, Chief Judge, DAVIS, NICHOLS, KASHIWA, BENNET and SMITH, Judges)

587-81C American Telephone and Telegraph Company, et. al.

Defendant's motion for rehearing filed September 1, 1982, of opinion dated August 11, 1982. (FRIEDMAN, Chief Judge, DAVIS, NICHOLS, KASHIWA, BENNET and SMITH, Judges)

401-82C Robert Di Falco

Plaintiff's motion for rehearing filed September 9, 1982, of order dated August 20, 1982. (FRIEDMAN, Chief Judge, NICHOLS and SMITH, Judges)

APPENDIX - PART B

Federal Statutes

10 U.S.C. § 2307. Advance Payments.

(a) The head of any agency may--

(1) make advance, partial, progress, or other payments under contracts for property or services made by the agency; and

(2) insert in bid solicitations for procurement of property or services a provision limiting to small business concerns advance or progress payments.

(b) Payments made under subsection (a) may not exceed the unpaid contract price.

(c) Advance payments made under subsection (a) may be made only if the contractor gives adequate security and after a determination by the head of the agency that to do so would be in the public interest. Such security may be in the form of a lien in favor of the United States on the property contracted for, on the balance in an account in which such payments are deposited, and on such of the property acquired for performance of the contract as the parties may agree. This lien is paramount to any other liens.

(d) Payments under subsection (a) in the case of any contract, other than partial, progress, or other payments

specifically provided for in such contract at the time such contract was initially entered into, may not exceed $25,000,000 unless the Committees on Armed Services of the Senate and the House of Representatives have been notified in writing of such proposed payments and 60 days of continuous session of Congress have expired following the date on which such notice was transmitted to such Committees and neither House of Congress has adopted, within such 60-day period, a resolution disapproving such payments. For purposes of this section, the continuity of a session of Congress is broken only by an adjournment of the Congress sine die, and the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of such 60-day period.

Aug. 10, 1956, C. 1041, 70A Stat. 131; Aug. 28, 1958, Pub.L. 85-800, § 9, 72 Stat. 967; Nov. 16, 1973, Pub.l. 93-155, Title VIII, § 807(c), 87 Stat. 616.

28 U.S.C. § 1491. Claims against United States generally; actions involving Tennessee Valley Authority

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of

this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States. To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just.

Nothing herein shall be construed to give the Court of Claims jurisdiction in suits against, or founded on actions of, the Tennessee Valley Authority, nor to amend or modify the provisions of the Tennessee Valley Authority Act of 1933, as amended, with respect to suits by or against the Authority.

June 25, 1948, c. 646, 62 Stat. 940; July 28, 1953, c. 253, § 7, 67 Stat. 226; Sept. 3, 1954, c. 1263 § 44(a)(b), 68 Stat. 1241; July 23, 1970, Pub.L. 91-350, § 1(b), 84 Stat. 449; Aug. 29, 1972, Pub.L. 92-415, § 1, 86 Stat. 652.

31 U.S.C. § 529. Advances of public moneys; prohibition against

No advance of public money shall be made in any case unless authorized by the appropriation concerned or other law. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment. It shall, however, be lawful, under the special direction of the President, to make such advances to the disbursing officers of the Government as may be necessary to the faithful and prompt discharge of their respective duties, and to the fulfillment of the public engagements. The President may also direct such advances as he may deem necessary and proper, to persons in the military and naval service employed on distant stations, where the discharge of the pay and emoluments to which they may be entitled cannot be regularly effected.

R.S. § 3648; Aug. 2, 1946, c. 744 § 11, 60 Stat. 809.

State Statutes

Va. Code § 8.1-201. General definitions.

Subject to additional definitions contained in the subsequent titles of this act which are applicable to specific titles or parts thereof, and unless

the context otherwise requires, in this act:

(44) "Value". Except as otherwise provided with respect to negotiable instruments and bank collections (§§ 8.3-303, 8.4-208 and 8.4-209) a person gives "value" for rights if he acquires them

Va. Code § 8.2-401. Passing of title; reservation for security; limited application of this section.

Each provision of this title with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title. Insofar as situations are not covered by the other provisions of this title and matters concerning title become material the following rules apply:

(2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading

(a) if the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; but

Va. Code § 8.2-402. Rights of seller's creditors against sold goods.

(2) A creditor of the seller may treat a sale or an identification of goods to a contract for sale as void if as against him a retention of possession by the seller is fraudulent under any rule of law of the state where the goods are situated, except that retention of possession in good faith and current course of trade by a merchant-seller for a commercially reasonable time after a sale or identification is not fraudulent.

(3) Nothing in this title shall be deemed to impair the rights of creditors of the seller

(a) under the provisions of the title on secured transactions (Title 8.9); or

(b) where identification to the contract or delivery is made not in current course of trade but in satisfaction of or as security for a preexisting claim for money, security or the like and is made under circumstances which under any rule of law of the state where the goods are situated would apart from this title constitute the transaction a fraudulent transfer or voidable preference. (1964, c. 219).

Va. Code § 8.2-501. Insurable interest in goods; manner of identification of goods.

(1) The buyer obtains a special property and an insurable interest in

goods by identification of existing goods as goods to which the contract refers even though the goods so identified are nonconforming and he has an option to return or reject them. Such identification can be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement identification occurs

(a) when the contract is made if it is for the sale of goods already existing and identified;

(b) if the contract is for the sale of future goods other than those described in paragraph (c), when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers;

(c) when the crops are planted or otherwise become growing crops or the young are conceived if the contract is for the sale of unborn young to be born within twelve months after contracting or for the sale of crops to be harvested within twelve months or the next normal harvest season after contracting whichever is longer.

(2) The Seller retains an insurable interest in goods so long as title to or any security interest in the goods remains in him and where the identification is by the seller alone he may until default or insolvency or notification to the buyer that the identification is final substitute other goods for those identified.

(3) Nothing in this section impairs any insurable interest

recognized under any other statute or rule of law. (1964, c. 219.)

Va. Code § 8.2-502. Buyer's right to goods on seller's insolvency.

(1) Subject to subsection (2) and even though the goods have not been shipped a buyer who has paid a part or all of the price of goods in which he has a special property under the provisions of the immediately preceding section [§ 8.2-501] may on making and keeping good a tender of any unpaid portion of their price recover them from the seller if the seller becomes insolvent within ten days after receipt of the first installment on their price.

(2) If the identification creating his special property has been made by the buyer he acquires the right to recover the goods only if they conform to the contract for sale. (1964, c. 219.)

Va. Code § 8.9-107. Definitions: "Purchase money security interest."

A security interest is a "purchase money security interest" to the extent that it is

(a) taken or retained by seller of the collateral to secure all or part of its price; or

(b) taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of

collateral if such value is in fact so used. (1964, c. 219.)

Va. Code § 8.9-204. When security interest attaches; after-acquired property; future advances.

(1) A security interest cannot attach until there is agreement (subsection (3) of § 8.1-201) that it attach and value is given and the debtor has rights in the collateral. It attaches as soon as all of the events in the preceding sentence have taken place unless explicit agreement postpones the time of attaching.

(2) For the purposes of this section the debtor has no rights

(a) in crops until they are planted or otherwise become growing crops, in the young of livestock until they are conceived;

(b) in fish until caught, in oil, gas or minerals until they are extracted, in timber until it is cut;

(c) in a contract right until the contract has been made;

(d) in an account until it comes into existence.

(3) Except as provided in subsection (4) a security agreement may provide that collateral, whenever acquired, shall secure all obligations covered by the security agreement.

(4) No security interest attaches under an after-acquired property clause

(a) to crops which become such more than one year after the security agreement is executed except that a security interest in crops which is given in conjunction with a lease or a land purchase or improvement transaction evidenced by a contract, mortgage or deed of trust may if so agreed attach to crops to be grown on the land concerned during the period of such real estate transaction;

(b) to consumer goods other than accessions (§ 8.9-314) when given as additional security unless the debtor acquires rights in them within ten days after the secured party gives value.

(5) Obligations covered by a security agreement may include future advances or other value whether or not the advances or value are given pursuant to commitment. (1964, c. 219.)

Va. Code § 8.9-301. Persons who take priority over unperfected security interests; "lien creditor."

(2) If the secured party files with respect to a purchase money security interest before or within ten days after the collateral comes into possession of the debtor, he takes priority over the rights of a transferee in bulk or of a lien creditor which arise between the time the security interest attaches and the time of filing.

Va. Code § 8.9-312. Priorities among conflicting security interests in the same collateral.

(3) A perfected purchase money security interest in inventory has priority over a conflicting security interest in the same inventory and also has priority in identifiable cash proceeds received on or before the delivery of the inventory to a buyer if

(a) the purchase money security is perfected at the time the debtor receives possession of the inventory; and

(b) the purchase money secured party gives notification in writing to the holder of the conflicting security interest if the holder had filed a financing statement covering the same types of inventory (i) before the date of the filing made by the purchase money secured party, or (ii) before the beginning of the twenty-one day period where the purchase money security interest is temporarily perfected without filing or possession (subsection (5) of § 8.9-304); and

(c) the holder of the conflicting security interest receives the notification within five years before the debtor receives possession of the inventory; and

(d) the notification states that the person giving the notice has or expects to acquire a purchase money security interest in inventory of the debtor, describing such inventory by item or type.

Va. Code § 11-1. Certain contracts void as to creditors and purchasers unless in writing; law governing validity of contracts creating security interests.

Every contract, not in writing, made in respect to real estate or goods and chattels in consideration of marriage, or made for the conveyance or sale of real estate, or a term therein of more than five years, and, except as otherwise provided in § 8.2-402 of the Uniform Commercial Code, every bill of sale or contract for the sale of goods and chattels when the possession is allowed to remain with the seller, shall be void, both at law and in equity, as to purchasers for value and without notice and creditors; provided, however, that if any such contract or bill of sale as is mentioned in this section creates a security interest as defined in the Uniform Commercial Code, its validity and enforceability shall be governed by the provisions of that Code. (Code 1919, § 5192; 1964, c. 314; 1966, c. 397.)

Va. Code § 55-95. Certain recorded contracts as valid as deeds.

Any such contract or bill of sale as is mentioned in § 11-1, if in writing and signed by the owner of the property, shall, from the time it is duly admitted to record, be, as against creditors and purchasers, as valid, so far as it affects real estate, as if the contract were a deed conveying the estate or interest embraced in the contract, and so far as it affects goods and chattels, as if possession had completely passed

at the time of such admission to record; provided, that as to goods whose possession is retained by a merchant-seller the provisions of subsection (2) of § 8.2-402 of the Uniform Commercial Code shall be controlling; and provided further, that if any such contract or bill of sale as is mentioned in § 11.1 creates a security interest as defined in the Uniform Commercial Code, its validity and enforceability shall be governed by the provisions of that Code. (Code 1919, § 5193; 1964, c. 314; 1966, c. 399.)

Va. Code § 55-96. Contracts, etc., void as to creditors and purchasers until recorded.

Every such contract in writing, and every deed conveying any such estate or term, and every deed of gift, or deed of trust, or mortgage conveying real estate or goods and chattels and every such bill of sale, or contract for the sale of goods and chattels, when the possession is allowed to remain with the grantor, shall be void as to all purchasers for valuable consideration without notice not parties thereto and lien creditors, until and except from the time it is duly admitted to record in the county or corporation wherein the property embraced in such contract, deed or bill of sale may be. The fact that any such instrument is in the form of or contains the terms of a quit-claim or release shall not prevent the grantee therein from being a purchaser for valuable consideration without notice, nor be of itself notice to such grantee of any unrecorded conveyance of or

encumbrance upon such real estate goods and chattels, nor shall the mere possession of real estate of itself be notice to purchasers thereof for value of any interest or estate therein of the person in possession; provided, that as to goods whose possession is retained by a merchant-seller the provisions of subsection (2) of § 8.2-402 of the Uniform Commercial Code shall be controlling; further provided that this § 55-96 shall not apply to any security interest in goods under the Uniform Commercial Code except as provided in subsection (5) of § 8.9-302. A recordation under the provisions of this section shall, when any real estate subject to the lien of any such contract has been annexed to or merged with an adjoining city subsequent to such docketing, be deemed to have been recorded in the proper clerk's office of such city. A recordation under this section shall not affect the rights of a creditor acquired under § 55-152.

The clerk of each court in which any such instrument is by law required to be recorded shall keep a daily index of all such instruments admitted to record in his office, and, immediately upon admission of any such instrument to record, the clerk shall index the same either in the daily index or the appropriate general index of his office. All instruments indexed in the daily index shall be indexed by the clerk in the appropriate general index within ninety days after admission to record. During the period permitted for transfer from the daily index to the general index, indexing in the daily index shall be a sufficient compliance with the requirements of this section as to indexing.

(Code 1919, § 5194; 1922, p. 474; 1944, p. 356; 1964, cc. 219, 309, 314; 1966, c. 400; 1974, c. 522.)

Federal Regulations

32 C.F.R. § 163.1. Scope: Financing defined.

This part covers the financing of contracts and subcontracts for the national defense. It is applicable to contract financing for all types of contracts for all kinds of work, supplies and services, except as provided in § 163.69-2 or as otherwise indicated herein. The term "financing" as used in this part covers Government guaranteed loans, advance payments and progress payments (not including partial payments for delivery of one or more completed units called for under a contract) necessary for both performance and termination purposes, to the extent authorized by law. Subpart F of this part covers the ascertainment and collection of contract debts.

32 C.F.R. § 163.2. Purposes.

This part is intended to (a) state basic contract financing policy, (b) assure proper uniformity in policies procedures and forms, (c) provide for application of the fundamental management principle of internal check and balance, (d) insure that the need for advance or progress payments by contractors will not be treated as a handicap in awarding contracts, (e) facilitate

and accelerate the making of progress payments requested by small business concerns under Government contracts, and (f) emphasize the usefulness and desirability of providing proper contract financing assistance to small business concerns. In addition, Subpart F of this part provides for the prompt ascertainment and timely collection of contract debts owed to the Department of Defense, provides an inducement for prompt payment by requiring the charging of interest on such indebtedness, states policies governing postponement of payments and covers compromises and other actions on certain claims pursuant to the Federal Claims Collection Act of 1966.

32 C.F.R. § 163.9. Advance payments; description.

Advance payments are advances of money, made by the Government to a contractor prior to, in anticipation of, and for the purpose of complete performance under a contract or contracts. Advance payments are made only to prime contractors. They are expected to be liquidated from payments due to the contractor incident to performance of contracts. Since they are not measured by performance, they differ from partial, progress, or other payments made because of and on the basis of performance or part performance of a contract. Advance payments may be made to prime contractors for the purpose of making subadvances to subcontractors.

32 C.F.R. § 163.11. Progress payments; description.

The term "progress payments," as used herein, signifies payments made as work progresses under a contract, upon the basis of costs incurred, of percentage of completion accomplished, or of a particular stage of completion. As used in this part this term does not include payments for partial deliveries accepted by the Government under a contract, or partial payments on contract termination claims.

32 C.F.R. § 163.24. Financial responsibility of contractors.

Procuring activities in placing contracts must give due regard to the financial capabilities of the supplier. Financial difficulties encountered by contractors and subcontractors may (a) disrupt production schedules, (b) cause wastage of manpower and materials, and (c) if connected with guaranteed loans, advance payments, or progress payments, result in monetary loss to the Government. Also, if financial crises occur in the course of a contractor's production, the need for continued production may make guaranteed loans or advance payments imperative for continuance of such production, even though monetary losses may be likely under the circumstances. In order to reduce these hazards so far as possible, contracts should be entered into only with those potential contractors who meet the requirements of § 1.903-1, or § 2.407 of this chapter, and who have the financial capacity or credit (giving due regard to

the availability of progress payments, guaranteed loans, and advance payments), technical skill, management competence, and plant capacity and facilities (including subcontracting capacity) reasonably to assure their ability to perform their contracts in accordance with their terms. Care should be taken also to the extent practicable to avoid the placement of additional contracts or subcontracts with contractors in situations where additional contracts will overload the contractor's production capacity, overextend his financial resources and credit, and thus tend to interfere with timely performance of contracts on hand, and create need for additional contract financing arrangements, which may be impossible to establish on a prudent basis. In all cases, whether involving formal advertising or negotiation, it must be determined that the contractor is financially and otherwise able to perform the contract. In addition, consideration must be given to the judgment, skill, and integrity of the potential contractor, and to his reputation and experience, including prior work of a similar nature done by him, and the other factors set forth in § 1.903-1, § 2.407 or § 3.101 of this chapter, as appropriate. Persons placing subcontracts, at all levels of subcontracting, should be encouraged to apply these standards in placing subcontracts. Some practical examples of important points which should be kept in mind are set out below.

32 C.F.R. § 163.26. Coordination before contract award.

For effective application of the principles stated in § 163.24, each purchasing office should be staffed with, or have available and use the services of persons qualified and competent to evaluate credit and financial problems. Among other things, the duties of such persons would be to arrange, prior to contract awards, and so far as practicable, prior to subcontract arrangements, that financing for performance of contemplated contracts and subcontracts is reasonably assured prior to or contemporaneously with the making of contracts. In those exceptional cases where there is substantial doubt that a prospective contractor has the financial capacity or credit resources essential to the performance of the contemplated contract, the interested procuring activity, after having determined that no satisfactory alternative sources of supply are readily available on terms equally as favorable to the Government, should prior to placement of the contract, consult with the appropriate contract financing office of the interested Department, to determine whether financing can prudently be arranged. These contract financing officers are the Director of Contract Financing, Office of the Comptroller of the Army; the Director of Contract Financing Office of the Comptroller of the Navy; the Deputy Comptroller of the Air Force; and the Comptroller, Defense Supply Agency. For other Departments (§ 1.201-5 of this chapter), the contract financing office will be within the office of the Agency Comp-

troller. In such consultation it should be resolved, if placement of the contract is deemed beneficial to the interests of the Government, whether and by what means financing should be provided.

32 C.F.R. § 163.28. Appropriate information; purposes.

The kinds of information and data that may be appropriate under the circumstances of particular cases (§ 163.27) for adequate disclosure of the contractor's financial condition, for full understanding of the propriety and reasonable necessity for contract financing, for evaluation of the contractor's ability to perform its contracts without loss to the Government, and for informed judgment with regard to the terms, conditions and protective provisions that may be appropriate and prudent for the protection of the Government, are outlined below. It is emphasized that only those items which are appropriate to the particular case will be required.

(a) Balance sheet and profit and loss statement for the most recent fiscal year prepared and certified by an independent public accountant (including his comments, if any), and, if available, similar financial data, for the two previous years; also latest available interim balance sheet and profit and loss statement of the current fiscal year; also a separate statement of amounts of defense and commercial sales. If audit reports are not available, then corresponding statements should be submitted, certified by an authorized

officer, partner, or individual proprietor as truly and fully setting forth the financial condition and operating results of the applicant; also, if a proprietorship, partnership or joint venture, personal financial statements of proprietor, partners, or members of joint venture and description of individual liabilities of partners or members of joint venture on contracts of partnership or joint venture;

(b) Summary history of contractor and its principal management personnel, indicating particularly any past insolvencies of the contractor or a predecessor or of the officers, partners, or proprietors; also a description of its products or services;

(c) Statement of all affiliates of the contractor, showing financial interests of the contractor in affiliates and of affiliates in the contractor, and also mutual officers, directors, and major stockholders or owners, and disclosing character and amount of business transactions with affiliates or with officers, directors, major stockholders or owners of the contractors or its affiliates; also, if a corporation, list of major stockholders, and shares held;

(d) Statement of compensation payable to each officer, partner, proprietor, and principal executive, and to each key employee receiving comparable compensation, including bonus, commission, and profit-sharing arrangements, together with similar data for the past two years; also past and

projected dividends, unless obtained with paragraph (a) of this section;

(e) Schedule of principal contracts are orders on hand, showing defense orders and civilian orders separately, and showing face amounts, unfinished amounts, and unliquidated advance or progress payments, and also indicating bids outstanding and contemplated and explanation concerning contracts under negotiation;

(f) Cash forecast, showing estimated disbursements and receipts for the period or periods involved (see §§ 163.28-1 and 163.28-2);

(g) Estimated profit and loss statements and estimated balance sheets (see § 163.28-3);

(h) Comparison of past financial results with estimates previously furnished by the contractor;

(i) Credit agency ratings of the contractor, and, when significant, credit agency ratings of principal subcontractors and of principal business customers (defense and commercial) of the contractor;

(j) Existing and contemplated credit or financing arrangements, names of parties and relationship, if any, to contractor, amounts available or to be available, periods of availability, and required or contemplated payments, including (1) loans and credits, (2) advances and progress payments, (3) projected equity capital increases, (4)

deferred trade credit, if any, (5) creditor subordinations or standbys, and (6) mortgages, liens, pledges, assignments, conditional sales, lease-purchases, hypothecations, and other encumbrances or security arrangements, both existing and contemplated;

(k) Status of all tax accounts, particularly federal income, excise, and withholding taxes, and social security taxes or contributions (including verification with Internal Revenue Service, when appropriate) with special attention to the matter of federal tax delinquencies (which are covered by the lien and right of distraint and levy provided by sections 6321 and 6331 of the Internal Revenue Code);

(l) Appropriate information, explanation and schedules to indicate (1) leases, deferred purchase arrangements, and patent or royalty arrangements, outlining terms and showing relationship, if any, of other parties to the contractor, (2) insurance maintained and to be maintained, (3) contemplated capital expenditures, debt reduction or retirement, and acquisitions of capital stock, (4) delinquencies on contracts, subcontracts or purchase orders, and status thereof, (5) pending or anticipated liability for contract price refunds, or for renegotiation, or for other Government claims, (6) anticipated losses on contracts, (7) contingent liabilities, including those on endorsements, guarantees, warranties, surety bonds, and material litigation pending or threatened, (8) aging and collectability of accounts and notes

receivable, status of disputed receivables, identification of any amounts included in receivables but not currently due and payable, (9) obsolescence of inventory and method of valuing inventory, (10) aging of accounts and notes payable, identifying major creditors and interest rates and other charges, if any, and status of significant disputed items, (11) adequacy of reserves for depreciation, (12) analysis of surplus;

(m) Significant ratios such as (1) inventory to annual sales, (2) inventory to current assets, (3) liquid assets to current assets, (4) liquid assets to current liabilities, (5) current assets to current liabilities, and (6) net worth to debt;

(n) Comments and opinion of audit agency concerning contractor's accounting system and controls, and available audit agency analysis of important elements of financial statements or projections;

(o) Other facts that may be appropriate for the purposes stated at the beginning of this section. See §§ 163.24-1 to 163.26.

32 C.F.R. § 163.79-2. Progress payment clause for small business concerns.

PROGRESS PAYMENT FOR SMALL BUSINESS CONCERNS (1972 JAN)

Progress payments shall be made to the Contractor as work progresses, from time to time upon request, in amounts

approved by the Contracting Officer upon the following terms and conditions:

(a) Computation of Amounts.

(1) Unless a smaller amount is requested, each progress payment shall be (i) eighty-five percent (85%) of the amount of the Contractor's total costs incurred under this contract plus (ii) the amount of progress payments to subcontractors as provided in (j) below; all less the sum of previous progress payments.

(2) The Contractor's total costs ((a)(1)(i)) shall be reasonable, allocable to this contract, and consistent with sound and generally accepted accounting principles and practices. However, such costs shall not include (i) any costs incurred by subcontractors or suppliers, or (ii) any payments or amounts payable to subcontractors or suppliers, except for completed work (including partial deliveries) to which the Contractor has acquired title and except for amounts paid or payable under cost-reimbursement or time and material subcontracts for work to which the Contractor has acquired title, or (iii) costs ordinarily capitalized and subject to depreciation or amortization except for the properly depreciated or amortized portion of such costs.

(3) The amount of unliquidated progress payments shall not exceed the lesser of (i) eighty-five percent (85%) of the costs mentioned in (a)(1)(i) above, plus any unliquidated progress

payments mentioned in item (a)(1)(ii) above, both of which are applicable only to the supplies and services not yet delivered and invoiced to and accepted by the Government, or (ii) 85 percent of the total contract price of supplies and services not yet delivered and invoiced to and accepted by the Government, less unliquidated advance payments.

(4) The aggregate amount of progress payments made shall not exceed 85 percent of the total contract price.

(5) If any any time a progress payment or the unliquidated progress payments exceed the amount permitted by this paragraph (a), the Contractor shall pay the amount of such excess to the Government upon demand.

(b) Liquidation. Except as provided in the clause entitled "Termination for Convenience of the Government," all progress payments shall be liquidated by deducting from any payment under this contract, other than advance or progress, the amount of unliquidated progress payments, or 85 percent of the gross amount invoiced, whichever is less. Repayment to the Government required by a retroactive price reduction will be made after calculating liquidations and payments on past invoices at the reduced prices and adjusting the unliquidated progress payments accordingly.

(c) Reduction or Suspension. The Contracting Officer may reduce or suspend progress payments, or liquidate them at a rate higher than the percentage stated in (b) above, or both,

whenever he finds upon substantial evidence that the Contractor (i) has failed to comply with any material requirement of this contract, (ii) has so failed to make progress, or is in such unsatisfactory financial condition, as to endanger performance of this contract, (iii) has allocated inventory to this contract substantially exceeding reasonable requirements, (iv) is delinquent in payment of the costs of performance of this contract in the ordinary course of business, (v) has so failed to make progress that the unliquidated progress payments exceed the fair value of the work accomplished on the undelivered portion of this contract, or (vi) is realizing less profit than the estimated profit used for establishing a liquidation percentage in paragraph (b), if that liquidation percentage is less than the percentage stated in paragraph (a)(1).

(d) Title. Immediately, upon the date of this contract, title to all parts; materials; inventories; work in progress; special tooling as defined in the clause of this contract entitled, " Special Tooling"; special test equipment and other special tooling to which the Government is to acquire title pursuant to any other provision of this contract; nondurable (i.e., noncapital) tools, jigs, dies, fixtures, molds, patterns, taps, gauges, test equipment, and other similar manufacturing aids title to which is not obtained as special tooling pursuant to this paragraph; and drawings and technical data (to the extent delivery thereof to the Government is required by other provisions of this contract); theretofore acquired or

produced by the Contractor and allocated or properly chargeable to this contract under sound and generally accepted accounting principles and practices shall forthwith vest in the Government; and title to all like property thereafter acquired or produced by the Contractor and allocated or properly chargeable to this contract as aforesaid shall forthwith vest in the Government upon said acquisition, production or allocation. Notwithstanding that title to property is in the Government through the operation of this clause, the handling and disposition of such property shall be determined by the applicable provisions of this contract such as: the Default clause and paragraph (h) of this clause; Termination for Convenience of the Government clause; and the Special Tooling clause. Current production scrap may be sold by the Contractor without approval of the Contracting Officer and the proceeds shall be credited against the costs of contract performance. With the consent of the Contracting Officer and on terms approved by him, the Contractor may acquire or dispose of property to which title is vested in the Government pursuant to this clause, and in that event, the costs allocable to the property so transferred from this contract shall be eliminated from the costs of the contract performance and the Contractor shall repay to the Government (by cash or credit memorandum) an amount equal to the unliquidated progress payments allocable to the property so transferred. Upon completion of performance of all the obligations of the Contractor under this contract, including liquidation of all

progress payments hereunder, title to all property (or the proceeds thereof) which had not been delivered to, and accepted by the the Government under this contract or which had not been incorporated in supplies delivered to and accepted by the Government under this contract and to which title has vested in the Government under this clause shall vest in the Contractor. The provisions of this contract referring to or defining liability for Government-furnished property shall not apply to property to which the Government shall have acquired title solely by virtue of the provisions of this clause.

(e) Risk of Loss. Except to the extent that the Government shall have otherwise expressly assumed the risk of loss of property, title to which rests in the Government pursuant to this clause, in the event of the loss, theft or destruction of or damage to any such property before its delivery to and acceptance by the Government, the Contractor shall bear the risk of loss and shall repay the Government an amount equal to the unliquidated progress payments based on costs allocable to such lost, stolen, destroyed or damaged property.

(f) Control of Costs and Property. The Contractor shall maintain an accounting system and controls adequate for the proper administration of this clause.

(g) Reports - Access to Records. Insofar as pertinent to the administration of this clause, the Contractor will (i) furnish promptly such relevant

reports, certificates financial statements, and other information as may be reasonably requested by the Contracting Officer, and (ii) give the Government reasonable opportunity to examine and verify his books, records and accounts.

(h) Special Provisions Regarding Default. If this contract is terminated pursuant to the clause entitled "Default," (i) the Contractor shall, upon demand, pay to the Government the amount of unliquidated progress payments and (ii) with respect to all property as to which the Government elects not to require delivery under the clause entitled "Default," title shall vest in the Contractor upon full liquidation of progress payments, and the Government shall be liable for no payment except as provided by the "Default" clause.

(i) Reservations of Rights. The rights and remedies of the Government provided in this clause shall not be exclusive, and are in addition to any other rights and remedies provided by law or under this contract. No payment, or vesting of title pursuant to this clause, shall excuse the Contractor from performance of his obligations under this contract, nor constitute a waiver of any of the rights and remedies of the parties under this contract. No delay or failure of the Government in exercising any right, power or privilege under this clause shall affect any such right, power or privilege, nor shall any single or partial exercise thereof preclude or impair any further exercise thereof or the exercise of any other right, power or privilege of the Government.

(j) Progress Payments to Subcontractors.

(1) The amount mentioned in item (a)(1)(ii) above shall be the sum of (i) all the progress payments made by the Contractor to his subcontractors and remaining unliquidated, and (ii) unpaid billings for progress payments to subcontractors which have been approved for current payment in the ordinary course of business, when under subcontracts which conform to (2) below.

(2) Subcontracts on which progress payments to subcontractors may be included in the base for progress payments pursuant to paragraph (a) of this clause are limited to those subcontracts in which there is expected to be a long "lead time" between the beginning of work and the first delivery, approximating four months or more for small business concerns and six months or more for firms which are not small business concerns, and in which the provisions regarding progress payments (i) are substantially similar to and as favorable to the Government as this "Progress Payments" clause, no more favorable to the subcontractor than this clause is to the Contractor and on a basis of not more than 85 percent of total costs (except that for those subcontractors that are not small business concerns a "Progress Payments" clause substantially similar to E-510.1 will be used with a percentage of not more than 80 percent, and (ii) make all rights of the subcontractor with respect to all property to which the Government has title under the subcontract subordinate to the rights of the Government to

require delivery of such property to it in the event of default by the Contractor under this contract or in the event of the bankruptcy or insolvency of the subcontractor.

(3) The Government agrees that any proceeds received by it from property to which it has acquired title by virtue of such provisions in any subcontract shall be applied to reduce the amount of unliquidated progress payments made by the Government to the Contractor under this contract. In the event the Contractor fully liquidates such progress payments made by the Government to him hereunder and there are progress payments to any subcontractors which are unliquidated, the Contractor shall be subrogated to all the Government's rights by virtue of such provisions in the subcontract or subcontracts involved as if all such rights had been thereupon assigned and transferred to the Contractor.

(4) The billings described in (j)(1)(i) above shall be paid promptly by the Contractor in the ordinary course of business not later than a reasonable time after payment of equivalent amounts by the Government to the Contractor.

(5) To facilitate small business participation in subcontracting under this contract the Contractor agrees to offer and provide progress payments to those subcontractors which are small business concerns, in conformity with the standards for customary progress payments stated in paragraph 50 of Appendix E of the Armed Services Procurement Regulation, as in effect on the

date of this contract. The Contractor further agrees that the need for such progress payments will not be considered as a handicap or adverse factor in the award of subcontracts.

32 C.F.R. § 163.94. Government title.

Since the clauses in § 163.79 give the Government title to all of the materials, work in process, and finished goods under contracts, care should be taken to assure, to the extent reasonably necessary, that the title to the Government will be free of all encumbrances. The procedure in this respect will necessarily vary with the particular circumstances of individual cases. Ordinarily, in the absence of reason to believe that the Government title may be subject to encumbrance, the contractor's certificate will be relied on. If any arrangements or conditions are found that would impair the contractor's right of disposition of the property affected by the progress payments, appropriate arrangements should be made to establish and protect the Government title. The existence of any such encumbrance is a violation of the contractor's obligations under the contract.

APPENDIX - PART C

Subsidiaries of Marine Midland Banks, Inc.

The Bank

Marine Midland Bank, N.A.

Domestic Subsidiaries

Marine Midland Realty Credit Corporation
Marine Midland Leasing Corporation
Marine Midland Properties Corporation
Marine Midland Buildings Corporation
Marine Midland Southwest Corporation
Marmid Life Insurance Company
Fitrust Corporation
Marine Midland Leasing Service, Inc.
Marine Midland Marketing Corporation
The Rhed Rhombohedron, Inc.
Tinker Properties Corporation
250 Park Avenue Corporation
Midland Research Corporation
Marine Midland Consumer Credit Corporation
Marine Midland Services Corporation
Arsenal Road Management, Inc.
Bronx River Management Corporation
Bronx River Management, Inc.
Esopus Management Corporation
H.H.W. Management, Inc.
Lee County Management Corporation
Marine-Massachusetts Real Estate, Inc.
Mariner Management Corporation
PICO Development Corporation
The Greenlefe Corporation
Greenlefe Golf & Racquet Club, Inc.
Greenlefe Realty, Inc.
Radisson-Greenlefe Corporation
Arrohead Associates, Inc.

Marine Midland Finance, N.V.
Marine Midland National Corporation
Marmid Aircraft Leasing Corporation
Eramin Corp. of Amherst, Inc.
Eramin Corp. of New Hebrides
Eramin Corp. of Puerto Rico
Eramin Corp. of the South Pacific
Eramin Corp. of Western New York
Eramin Marina Corporation
Minnmar Corporation
Banmar Corporation

The Edge Act Companies (and related domestic subsidiary)

Marine Midland Overseas Corporation
Marine Midland International Bank

Foreign Subsidiaries

Avon Shipping, Inc.
Banque MMB-Interunion
Corylus Investments Limited
First Tower Shipping Corp.
Galaxia Navigation Company Limited
Intermarine Limited
Intermarine Shipping Holdings (Jersey) Limited
International Ship Finance (Liberia), Inc.
International Ship Finance (Panama), Inc.
International Treasury Management, Inc.
Lady Margaret Maritime Corp.
Marine Midland Bank (Nominees) Limited
Marine Midland do Brasil, Limitada
Marine Midland (Export Finance) Limited
Marmid Finance Limited
Rappresentanza Marine Midland Bank-New York SRL
Wardley Australia Limited

The Hongkong and Shanghai Banking Corporation
List of Subsidiaries and Related Interests
As of June 30, 1982

AG Underwriting Managers Ltd
AGS Management Ltd
Abashira Investments Limited
Abberley Company Ltd
Acceptor Enterprises Ltd
Access Control Systems (Australia Pty Ltd
Access Control Systems Pty Ltd
Ace Company SA
Achievement Company SA
Agile Nominees Ltd
Albany Investors Limited
Allegiance Shipping Company SA
Allied Shipping Co SA
Al Sagr Insurance Co of Saudi Arabia Ltd
Al Sagr Insurance Co UAE Ltd
Angelot Limited
Angel Trustee Company Ltd
Angus Shipping Ltd
Anton Underwriting Agencies Ltd
Antony Gibbs Administration Services Ltd
Antony Gibbs Associates Ltd
Antony Gibbs Completions Ltd
Antony Gibbs Export Finance Ltd
Antony Gibbs Financial Services (CI) Ltd
Antony Gibbs Holdings Ltd
Antony Gibbs Insurance Co Ltd
Antony Gibbs Investment Management Ltd
Antony Gibbs Ireland Ltd
Antony Gibbs (Middle East) Ltd
Antony Gibbs Northern Insurance Brokers Ltd
Antony Gibbs Pension Services Ltd
Antony Gibbs (Overseas Investments Ltd)
Antony Gibbs Property Services Ltd
Antony Gibbs (Personal Financial Planning) Ltd

Antony Gibbs Securities Ltd
Antony Gibbs Simmers (Insurance Brokers) Ltd
Antony Gibbs & Sons Ltd
Antony Gibbs & Sons (Insurance) Ltd
Antony Gibbs and Sons (Nominees) Ltd
Antony Gibbs UK Insurance Brokers Ltd
Argo Enterprises Company Limited
Ariadne Films Limited
Arolsen Pty Ltd
Arthur Weller Australia Pty Ltd
Arthur Weller Holdings NV
Arthur Weller Ltd
Arthur Weller NSW Pty Ltd
Arthur Weller SA Pty Ltd
Arthur Weller Tasmania
Arthur Weller UK Ltd
Arthur Weller Victoria Pty Ltd
Asher & Co (HK) Ltd
Asia Magazine Distributors Ltd
Asia Magazines Ltd
Aspiration Land Investment Ltd
Associated Brokers International (Pvt) Ltd
Associated Engineers Ltd
Associated Properties Limited
Athenia Company Limited
Axiom Marketing Services Pty Ltd
BBME Nominees Ltd
The Bank of Iran and the Middle East
Banking Computer Services Pte Ltd
Baroness Company SA
Basingstoke Holdings Ltd
Basingstoke Investments Ltd
Beauty Company SA
Beauty Enterprises Ltd
Begonia Shipping Co SA
Benteng Redevelopment Sdn Bhd
Benton Enterprises Limited
Bermuda Investments Limited
Bestport Limited
99 Bishopsgate Ltd
Bloomfield Co Ltd

B Lochinvar & Sons Ltd
Bohemia Enterprises Ltd
Bonaventure Investors Limited
Bonaventure Properties Limited
Bonaventure Textiles Limited
Boston Investments Limited
Bowmaker (CA) (Pvt) Ltd
Bridgepalm Ltd
British Acceptance Corporation Ltd
The British Bank of the Lebanon S.A.L.
The British Bank of the Middle East
British and Chinese Corporation Ltd
Cactus Shipping Co SA
Callender & Associates Pty Ltd
Cannae Ltd
Cararnba Limited
Carica Shipping Inc
Carlingford Australia Insurance Co Ltd
Carlingford Australia Insurance Holdings Pty Ltd
Carlingford BV
Carlingford Insurance Agencies Ltd
Carlingford Insurance Brokers Singapore Pte Ltd
Carlingford Insurance Co Ltd
Carlingford International Ltd
Carlingford Investments Ltd
Carlingford Life and General Assurance Co Ltd
Carlingford Ltd
Carlingord NV
Carlingford PNG Ltd
Carlingord Swire Assurance Ltd
Carlingford Swire Assurance (Bermuda) Ltd
Carnation Shipping Co SA
Casa Pupo (Hong Kong) Limited
Cataract Company Limited
Cathay Holidays Ltd
Cathay Pacific Airways (London) Ltd
Cathay Pacific Airways Ltd
Cathay Pacific (Netherlands) BV
Cayetana SA

Central Properties Limited
Central Registration (HK) Ltd
Chancery Tankers Ltd
Cheung Kong (Holdings) Limited
Cheung Kong Industrial Company Limited
Cheung Lee Cheong Realty Company Limited
Chiltern Reinsurance Company Limited
Chin Chow Estates Limited
Chow Hing Investment Company Limited
Citadel Insurance Co Ltd
City Centre Properties Limited
Cloudview Company Limited
Collyer Quay Properties (Pte) Ltd
Colt Company SA
Colwyn Investments Ltd
Community Finance Company Limited
Concord Company SA
Concord Credit Ltd
Concord Export Finance Co Ltd
Concord International (Curacao) NV
Concord Leasing GmbH (Austria)
Concord Leasing GmbH (Germany)
Concord Leasing Inc.
Concord Leasing Ltd
Concord Leasing NV/SA
Concord Leasing Services Ltd
Concorde Equipment SA
Concorde Finance SA
Continental Scarsdale Limited
Conqueror Company SA
Cotswold Investment Ltd
Cranleigh Investments Ltd
Credit Finance and Industrial Corp
Credo Shipping Co SA
Crorebridge Bank Limited
Dalbeattie Investments Ltd
Darmswell Limited
Diameco Investments Ltd
Dignity Investment Company Limited
Diplomat Company SA
Disappearance Project Company Ltd
Dominus Investment Ltd
Dormouse Limited

Dun & Bradstreet (HK) Ltd
Dungeness Investment Ltd
Durness Investment Ltd
Dynamic Tankers Ltd
ETC Services Ltd
Eastbourne Finance Ltd
East Point Reinsurance Company (Bermuda) Ltd
East Point Reinsurance Management Company (Bermuda) Ltd
East Point Reinsurance Management Company of Hong Kong Ltd
Enfield Shipping Ltd
Enrico Shipping Limited
Equator Bank Ltd
Eugene Shipping Limited
EuroConcord Finance BV
EuroConcord Leasing BV
Exeter Shipping Limited
Explorer Company SA
Express Motors Limited
The Far Eastern Economic Review Ltd
Filmset Ltd
Finaway Pty Ltd
Finaway Properties Pty Ltd
Fiver Ltd
Floral Shipping Co Inc
Fook Fun Investment Company Limited
Fortune Holdings Ltd
FortWay Finance Ltd
Fowlers Limited
Foxglove Limited
Francolyn Shipping Ltd
Franz Shipping Limited
Frontier Enterprises Limited
G.E. Marden & Company Limited
GH (Insurance Agencies) NV
Gairloch Investments Limited
Gatechurch Property Management Ltd
Gatewood Investments Ltd
Gelhood Ltd
Gibbs & Company
Gibbs & Co (Central Africa) (Pvt) Ltd

Gibbs Bright & Co Pty Ltd
Gibbs Bright Holdings Pty Ltd
Gibbs Bright (Hong Kong) Ltd
Gibbs Bright (New Zealand) Ltd
Gibbs Bright Nominees Pty Ltd
Gibbs Bright Technical Services Pty Ltd
Gibbs Gulf Insurance Consultants
Gibbs Insurance Consultants Ltd
Gibbs Insurance Holdings Ltd
Gibbs Manufacturers (Pvt) Ltd
Gibbs Sage Ltd
Gibbs Wardley Middle East Ltd
Gibbs, Williamson (Bolivia) Ltd
Gibbs Y Cia SAC
Gillebri Pty Ltd
Gingerfield Ltd
Gloxinia Investment Ltd
Gordona SA
Gottfried Company Limited
Grace Company SA
Granada Realty Company Limited
Grand Realty Company Limited
Grandway Investments Ltd, Inc
Gravel Enterprises Limited
Greenwich Investors Limited
Grenville Eastern Holdings Ltd
Grenville Insurance Holdings Ltd
Grenville Pacific Holdings Ltd
Grenville Property Holdings Ltd
Grenville Resources Holdings Ltd
Grenville Transportation Holdings Ltd
Grenville Trustee Company (Isle of Man) Ltd
Guardforce Limited
Gumpert Realty Company Limited
Gunsimton Development Limited
Guttatta Investment Ltd
HAECO Investments Ltd
HK Aircraft Engineering Co Ltd
HK Airways Ltd
HK Unit Trust Managers Ltd
HSBC Holdings BV
HSBC Holdings UK Ltd

HS Property Management Co Ltd
HT Russell and Sons Pty Ltd
Hakone Holdings SA
Hambauxon Co Ltd
Hambleden Investment Corporation
Hamburrough Co Ltd
Hang Che Lee Co Ltd
Hang Dah Chong Investments Ltd
Hang Seng Bank Ltd
Hang Seng Bank (Trustee) Ltd
Hang Seng Bank (Bahamas) Ltd
Hang Seng Credit Ltd
Hang Seng Credit (Bahamas) Ltd
Hang Seng Finance Ltd
Hang Seng Finance (Bahamas) Ltd
Hang Seng (Nominee) Ltd
Hang Shun Lee Co Ltd
Hang Tung Travel Service Ltd
Harrogate Investment Limited
Harthover (1982) Ltd
Harthover Project Public Limited Company
Harvey Shipping Limited
Haseba International Management Ltd
Haseba Investment Company Ltd
Hawthorn Finance Limited
Hazel Company SA
Hazel General Trading Co Ltd
Hazelworth Company Limited
Heath Shipping Inc
Hendale Navigation Co Ltd
Hexagon Productions Ltd
Highbury Investment Company Limited
Highclere (Bahamas) Ltd
Highclere Investments Ltd
Himalaya Investment Ltd
Hin Ngai Development Company Limited
Hogg Robinson and Antony Gibbs SA, Limitada
Honggroup Nominees Ltd
Hong Kong and New Zealand Properties Ltd
Hongkong & Shanghai Bank (Kuala Lumpur) Nominees Sdn Bhd
Hongkong & Shanghai Bank (Trustee) Ltd

Hongkong & Shanghai Bank (Malaysia) Trustee Ltd
Hongkong & Shanghai Bank (Singapore) Nominee Pte Ltd
Hong Kong and Shanghai Bank Trustee (Jersey) Ltd
Hong Kong and Shanghai Bank Nominees (Jersey) Ltd
Hong Kong and Shanghai Banking Corporation (CI) Ltd
Hong Kong and Shanghai Banking Corporation (Nominees) Ltd
Hong Kong and Shanghai (Properties) Ltd
Hong Kong and Shanghai (Shipping) Ltd
Hong Kong and Shanghai Thomas Cook Ltd
Hong Kong and Shanghai Trustee (Guernsey) Limited
Hong Kong and Shanghai Trustee (Isle of Man) Ltd
Hong Kong Bank Servicos Ltda
Hongkong Bancorp Inc
Hongkong Bank of Canada
Hongkong Bank Trustee Ltd
Hongkong Bank Trustee (Singapore) Ltd
Hongkong Bank & Trust Co Ltd
Hongkong Bank International
Hongkong Egyptian Bank
Hongkong Fintracon Ltd
Hopeful Investment Limited S.A.
Hopley Investment Company Limited
Hop Wing Tai Properties Ltd
Horse Shoe Industrials Ltd
How Tun Realty Company Limited
Hui Yin Hing Company Limited
IBJ Finance Company (Hong Kong) Limited
Ibsonville Ltd
Instant Wealth Company Limited
Insurex Pty Ltd
Intermarine Australia Ltd
Intermarine Management Ltd
Intermarine Participations Pty Ltd
Intermarine Securities Ltd
International Capital Corp

International United Shipping Agency Limited
International United Shipping and Investment Co Ltd
International Vetrans Inc.
Ipogras Ltd
Isoba Limited
Jackson Holdings BV
Jonathan Limited
Jonmar Estates Pty. Limited
Johnmar Estates (W.A.) Pty. Limited
Jui Fu Limited
Jungali Investment Ltd
Juniper Shipping Ltd
Kai Tak Refuellers Co Ltd
Kawineer Development Limited
Keep Fariyi Company Limited
Kellett Holdings NH Ltd
Kellett Investments Ltd
Kellett N.V.
Kellett (New Hebrides) Ltd
Kewbridge Company Limited
Kilburn Enterprises Limited
Kingfield Company Limited
Knight Company SA
Knowlton Enterprises Limited
Korea International Merchant Bank
Kris Company Ltd
Kwok Sam Development Company Limited
Lai Chi Kok Investments Ltd
Lambda Enterprises Limited
Langley Enterprises Limited
Langley Enterprises S.A.
Lankanton Company Limited
Lantao Development Company Limited
Lever Printing Factory Ltd
Li's Investment Limited
Liana Company Ltd
Liberian Amethyst Transports Inc
Liberian Athene Transports Inc
Liberian Clover Transports Inc
Liberian Cougar Transports Inc
Liberian Countess Transports

Liberian Courage Transports Inc
Liberian Crest Transports Inc
Liberian Cross Transports Inc
Liberian Cypress Transports Inc
Liberian Empress Transports, Inc
Liberian Eternity Transports Inc
Liberian Expedience Transports Inc
Liberian Flame Transports Inc
Liberian Flint Transports, Inc
Liberian Galaxie Transports Inc
Liberian Mars Transports Inc
Liberian Onyx Transports Inc
Liberian Peony Transports Inc
Liberian Poplar Transports Inc
Liberian Pristella Transports Inc
Liberian Raven Transports Inc
Liberian Shield Transports Inc
Liberian Sickle Transports Inc
Liberian Skylark Transports Inc
Liberian Sparta Tarnsports Inc
Liberian Stag Transports Inc
Liberian Stingray Transports Inc
Liberian Swift Transports Inc
Liberian Thrush Transports Inc
Liberian Titan Transports Inc
Liberian Tulip Transports Inc
Liberian Ulysses Transports Inc
Liberian Unity Transports Inc
Liberian Violet Transports Inc
Liberian Viscount Transports Inc
Liberian Wasp Transports Inc
Licores Seagers & Stock de Chile S.A.I.C.
Lion Corporate Services Ltd
Lionel Sage (Life and Pension Consultants) Ltd
Lionel Sage (Pension Services) Ltd
Lionel Sage (Underwriting Agencies) Ltd
Llandudno Investments
Longevity Company SA
Longevity Investment Company Limited
Lucky Land S.A.
Ludlow Navigation Co Ltd

MT & MM Pty Ltd
Majestic Holdings Company Limited
Makari Investment Ltd
Manifact Holdings S.A.
Marine Navigation Company Limited
Maritime Investment Company Limited
Marlesca (Hong Kong) Limited
Marnav Holdings Ltd
Menorca Investments Limited
Mercantile Bank (Agency) Pte Ltd
Mercantile Bank (Hong Kong Nominees) Ltd
Mercantile Bank Ltd
Mercantile Bank (Malaya) Nominees Sdn Bhd
Mercantile Bank (Nominees) Ltd
Mercantile Bank (Singapore) Nominee Pte Ltd
Mercury Investors Limited
Merino Ltd
Merryland Company Ltd
MetWay Limited
Miami Investment Ltd
Michigan Investments Ltd
Middle East Finance Co Ltd
Middle East Insurance Holdings Ltd
Milestone Co Ltd
Millbury Industrials Ltd
Minda Estates Limited
Mongkok One Ltd
Mortgage and Finance Ltd
Mortgage and Finance (Malaysia) Bhd
Multiversal Traders Hong Kong Ltd
N Z I International Acceptances Ltd
Nasali Co Ltd
Nevrus Forty One Ltd
Newborough Pty. Limited
New Sydney Enterprise Ltd
Nightingale Shipping Co SA
Nikko Investment Co Inc
Notting Hill Development Limited
Oakengate Company SA
Oakhill of California Properties (Hong Kong) Ltd

Obelix Hong Kong Ltd
Obelix Ltd
Odin Holdings (HK) Limited
Ogbourne Shipping Ltd
Oleifera Investments Ltd
Olivet Business Corporation
Ondine Ltd
1 Queens Road Central Ltd
Orchard Shopping Village Pty Ltd
Oriental Investment BV
Oristle Investment (Nos 1-20) Ltd
Oroton Investments Ltd
Ostend Shipping Limited
Oswesry Investments Ltd
Owens Company Limited
P T Manning Development
P T Wardley Summa Leasing Ltd
Pakenham Investments Ltd
Pall Mall Nominees Ltd
Panasia Book Distributors Ltd
Panelboard Sales Pty Ltd
Pannoch Investments Ltd
Papua New Guinea Forest Exports Pty Ltd
Patanadapi Limited
Peak Shipping Company SA
Perpetual Publicity Ltd
Peter Richards Studio Limited (in liquidation)
Pethurst International Ltd
Pethurst Ltd
Philippine Development and Industrial Corp
Pipkin Project Company Limited
Pittencrieff Investments Ltd
Pittenship Limited
Poplar Navigation Inc
Primrose Shipping Co SA
Proton Transports (Bermuda) Ltd
Provident Holdings Ltd
Pyracantha Investment Ltd
Quadruped Limited
Quelton Company NV
Ramsuder Investments Limited

Randax Investments Limited
Real Property Leases Ltd
Real Property Leases Pty Ltd
Regent Bellis Shipping Co SA
Regent Investment Holdings Inc
Regent Orchid Shipping Inc
Regent Buttercup Shipping Inc
Regent Camellia Shipping Co SA
Regent Cedar Shipping Inc
Regent Cherry Shipping Inc
Regent Cosmos Shipping Inc
Regent Daffodil Shipping Inc
Regent Daisy Shipping Co SA
Regent Maple Shipping Co Ltd
Regent Mayflower Shipping Co SA
Regent Oak Shipping Co Ltd
Regent Palm Shipping Co Ltd
Regent Petunia Shipping Inc
Regent Quince Shipping Co SA
Regent Shipping Ltd
Regent Tampopo Shipping Co Ltd
Regent Tulip Shipping Co SA
Regent Zinnia Shipping Inc
Resources and Investment Finance Ltd
Resources Investment Inc
Rex Shipping Company, S.A.
River Cape Shipping Co SA
Riverhead Shipping Ltd
Ronda Investment Ltd
Runcible Company Limited
Runter Investment Limited
SIH (Vila) Ltd
Saint Como Ltd
Sang Fai Investment Co Ltd
The Saudi British Bank
Schuhkraft & Crosbie Pty Ltd
Securair International Ltd
Securair Ltd
Shaprs Pixley Wardley Ltd
Shepperton Company Limited
Shin Kong Limited
Shun Cheong Steam Navigation Company Limited

Shun Cheong (Singapore) Pte Limited
Shun Hing Investment Company Limited
Shunwind Company Limited, S.A.
Silky Investment Company Limited
Silom Limited
Silverbell Limited
Sirius Holdings NV
Sirius Insurance Co
Skua Navigation Limited
Snowden Investment Ltd
Sociedad Commercial Y de Inversiones "Anton" Limitada
Societe Immobiliere Atlas
Solandra Investment Ltd
South China Morning Post Ltd
Speedlink SA
Spirit Company SA
Splendour Company SA
Stanbridge International Bank Ltd
State Investment House (Hong Kong) Ltd
State Investment House Inc
State Investment House (Nominees) Ltd
State Leasing (Hong Kong) Ltd
Straits Navigation, Inc.
Strangford Investments Ltd
Stripecrest Ltd
Swiftsure Enterprises Company Limited
Swire Air Caterers Ltd
Sword Assurance Ltd
Tai On Steam Navigation Company Limited
Tai Ping Steamship Navigation Company Limited
Tamic International Pty Ltd
Taunton Investment Ltd
Tenix Ltd
Thurber Investment S.A.
Tillmook Investments Ltd
Tobermoray Investment Ltd
Tonbridge Company Limited
Tonfolio Investments Limited
Tranquility Shipping Co SA
Transworld Security Co Ltd
Trelithick Company Limited

Trilliam Investment Ltd
Triumph Holdings Limited
Troya Corporation NV
Turkington Company Limited
Tyne Mouth Enterprises Ltd
UDA Merchant Bankers Bhd
UDA Nominees Bhd
Unipak (Hong Kong) Limited
Upsandowns Grazing Pty. Limited
US Concord Inc
Verbena Investment Ltd
Vinford Ltd
Vogue Laundry Service Ltd
W S Capital Co Ltd
WTL Limited
Wah Luen Fung Company Limited
Wai Him Company Limited
Wardley Asia Ltd
Wardley Australia (Holdings) Ltd
Wardley Australia Ltd
Wardley Australia Securities Ltd
Wardley Bond Management Ltd
Wardley Data Services Ltd
Wardley Development Finance Ltd
Wardley Finance Ltd
Wardley Group Ltd
Wardley Holdings Ltd
Wardley International Bank Ltd
Wardley International Bank (Vila) Limited
Wardley International BV
Wardley International Ltd
Wardley International Management Ltd
Wardley International NV
Wardley Investments (NH) Ltd
Wardley Investments (NZ) Ltd
Wardley Investment Management Ltd
Wardley Investment Services Ltd
Wardley Leasing Ltd
Wardley Limited
Wardley (Malaysia) Sdn Bhd
Wardley Middle East Ltd
Wardley Nikko Management Ltd

Wardley Nominees Ltd
Wardley Realty Ltd
Wardley Securities Ltd
Wardley Services (New Hebrides) Ltd
Wardley Shipping Services Ltd
Wardley (Singapore) Nominees Pte Ltd
Wardley Thailand Ltd
Watership Productions Ltd
Wayfoong Credit Ltd
Wayfoong Finance Ltd
Wayfoong Mortgage and Finance (Singapore) Ltd
Wayfoong Shipping Services Ltd
Wayhong (Bahamas) Ltd
Wayhong Finance Ltd
Wayhong Investment Ltd
Wayhong NH Ltd
Wayhong Properties Ltd
Waylee Holdings Ltd
Waylee Investments Ltd
Westham Bank Ltd
Westham Investment and Management Consultancy Ltd
Westham Ltd
Wheelock Marden & Company Limited
Wideland Investors Limited
Winnipeg Investments Ltd
Winston Securities Corporation S.A.
World Clipper Shipping Ltd
Woodhall Co Ltd
World Atlantic Finance Limited
World Denver Shipping Ltd
World Fairfax Shipping Ltd
World Finance International Ltd
World Hector Shipping Ltd
World International (Holdings) Limited
World Logan Shipping Ltd
World Manor Shipping Ltd
World Marine Transportation Inc
World Maritime Ltd
World Maritime Bahamas Ltd
World Maritime Ltd, Hong Kong
World Planet Shipping Ltd

World Select Shipping Ltd
World Shipping & Investment Co Ltd
World-Wide Secretaries Limited
World-Wide Wheelock Shipping, Inc.
World-Wide Investment Company Limited
World-Wide Marine and Fire Insurance Company Limited
World-Wide Shipping Company Limited
World-Wide Steamship Company Limited
Yan Hing Mining Company Limited
Yan Nin Development Co Ltd
Yee Tin Tong Printing Press Ltd
Ying Cho Fat Company Limited
Yiu Mok Estates Limited

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No. 82-1026

In the Supreme Court of the United States

OCTOBER TERM, 1982

MARINE MIDLAND BANK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (FORMERLY THE UNITED STATES COURT OF CLAIMS)

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Cases:

Armstrong v. *United States*, 364 U.S. 40 3

Boeing Co. v. *United States*, 338 F.2d 342, cert. denied, 380 U.S. 972 3

Double H Products Corp., In re, 462 F.2d 52 3

J.F. Hodgkins Co. v. *United States*, 318 U.S. 932 3

Murdock Machinery & Engineering Co., In re, 620 F.2d 767 4

Shephard Engineering Co. v. *United States*, 287 F.2d 737, rehearing denied, 289 F.2d 681 3

United States v. *Ansonia Brass & Copper*, 218 U.S. 452 3

United States v. *Digital Products, Co.*, 624 F.2d 690 3

United States v. *Kimbell Foods, Inc.*, 440 U.S. 715 3

Constitution and statutes:

United States Constitution, Fifth Amendment 2

Federal Courts Improvements Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 1

10 U.S.C. 2202 2

10 U.S.C. 2307 2

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the Court of Claims[1] erred in holding that the title vesting clauses in three government contracts with an insolvent debtor took priority over petitioner's floating lien on the debtor's property.

1. In 1977, Bond Trailer Division, Inc. ("Bond"), a government defense contractor, guaranteed to petitioner the payment of a certain indebtedness of a third party and secured this guaranty through a floating lien on all of Bond's machinery and inventory. Bond was exclusively a government contractor (Pet. App. 2) and entered into three

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[1]The decision below was rendered on August 25, 1982, prior to the effective date of the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, which abolished the Court of Claims and transferred its appellate functions to the new United States Court of Appeals for the Federal Circuit.

munitions contracts with the government in 1976 and 1978. As a condition of the government's progress payments to Bond during production, each contract contained a clause vesting in the United States title to all inventory and work in progress "allocated or properly chargeable" to that contract (*ibid.*).

Upon Bond's default under its guaranty, petitioner sued in the state courts of Virginia to obtain possession of the collateral. The United States intervened in that proceeding, asserting its ownership of the property, and removed the case to the United States District Court for the Western District of Virginia. Following Bond's subsequent bankruptcy petition, the bankruptcy court abandoned all interest in the collateral under an agreement that the government would take possession of the collateral subject to petitioner's claim for $250,000 should a court later determine that petitioner's security interest was paramount to the interest asserted by the government. The district court then transferred the case to the Court of Claims (Pet. App. 3). On the parties' cross-motions for summary judgment, the Court of Claims dismissed petitioner's complaint on the ground that it was due no compensation under the Fifth Amendment for a taking of its alleged interest in the contested property.

2. The Court of Claims correctly recognized the superiority of the government's claim, as created by federal law, and emphasized the existence of a unique federal interest that is not subject to state recording statutes.[2] The court

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[2]In reaching this result, the Court of Claims characterized the government's interest in the property as a lien rather than as title. An analysis more in keeping with established precedent would have recognized the government's interest as one of title over the property. In 10 U.S.C. 2307, Congress expressly empowered the Department of Defense to employ a progress payment system. Congress also directed (10 U.S.C. 2202) the agency to implement such a system in accordance with regulations promulgated by the Secretary. In carrying out this

further concluded that its holding merely followed the modern practice of giving priority to purchase money security interests, which it considered to be closely analogous to the interest created by the government's progress payment system (Pet. App. 15). This decision does not conflict with the holding of any other court and does not warrant further review.

a. Petitioner argues (Pet. 10-11) that the decision below is inconsistent with *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979). There, the Court held that, absent a congressional directive, the relative priority of private liens and consensual liens arising from certain social welfare lending programs was to be determined under nondiscriminatory state law. *Id.* at 740. In analyzing whether to adopt state law as the basis for decision, or to fashion a nationwide federal rule, *Kimbell Foods* set forth three criteria: (1) whether the nature of the federal program involved requires that it be uniform in character throughout the nation, (2) whether the application of state law would frustrate a specific objective of the federal program, and (3) whether the application of a federal rule would disrupt relationships predicated on state law. *Id.* at 728-729.

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charge, the Secretary issued regulations requiring that all contracts using the progress payment system contain a provision vesting title in the United States for all goods purchased for the production requirements of the contract. For more than 70 years the courts have consistently given title vesting provisions in government contracts their intended effect. See, *e.g.*, *Armstrong* v. *United States*, 364 U.S. 40 (1960); *United States* v. *Ansonia Brass & Copper Co.*, 218 U.S. 452 (1910); *United States* v. *Digital Products Co.*, 624 F.2d 690 (5th Cir. 1980); *In re Double H Products Corp.*, 462 F.2d 52 (3d Cir. 1972); *Boeing Co.* v. *United States*, 338 F.2d 342 (Ct. Cl. 1964), cert. denied, 380 U.S. 972 (1965); *J.F. Hodgkins Co.* v. *United States*, 318 F.2d 932 (Ct. Cl. 1963); *Shephard Engineering Co.* v. *United States*, 287 F.2d 737 (8th Cir.), rehearing denied, 289 F.2d 681 (1961).

The Court of Claims viewed this case under the *Kimbell Foods* standards and correctly concluded (Pet. App. 15) that "resort to state laws would not be appropriate in this case, as contrary to evident congressional intent and established federal practice." Moreover, the court below specifically recognized the necessity for a uniform rule of decision with respect to procurement contracts (*ibid.*). Thus, the court correctly found that the government's interest in the collateral was not subject to state recording statutes. The court further observed that general creditors would not be harmed by this rule, particularly pre-existing creditors who would retain their liens on property owned by the debtor when the loan was made but not on after-acquired property underwritten by the government (*ibid.*).

b. Petitioner also contends (Pet. 11) that the Court of Claims reached a result inconsistent with the Tenth Circuit's decision in *In re Murdock Machinery & Engineering Co.*, 620 F.2d 767 (1980). But, as the Court of Claims stated, *Murdock* is distinguishable (Pet. App. 12-13). *Murdock* arose from the attempt of a government contractor's supplier to halt delivery of goods still in transit. Not only did that case not involve a dispute between the government and a floating lien creditor,[3] but no argument was presented to the Tenth Circuit that procurement programs demanded a uniform commercial law (Pet. App. 12-13 n.8). More fundamentally, the Court of Claims reasoned that federal common law did not require the title vesting clause to fit into a state recording system of which it was never intended to be a part (*id.* at 13).

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[3]As the Court of Claims noted (Pet. App. 12 n.8), "[o]ur case * * * does not involve a mere supplier, who may well only deal with a government contractor as one of many identical orders received on any given day. We are dealing with a lender, part of whose job is to become familiar with a prospective debtor's operations. The burden on suppliers that the Tenth Circuit found so important is not a burden on lenders * * *."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

FEBRUARY 1983

DOJ-1983-02